Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOSEPH V. MAZARES, JR. and
MICHAEL R. TESTMAN,

Petitioners,

v.

DEPARTMENT OF THE NAVY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This petition presents a question of first impression to this Court: whether the Department of the Navy may lawfully order civilian mariners to take the anthrax vaccine.

PARTIES TO THE PROCEEDINGS BELOW

Joseph V. Mazares, Jr. and Michael R. Testman, petitioners herein, filed the action.

Department of the Navy, respondent.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS BELOW	ii
CITATIONS TO THE OPINIONS BELOW	1
JURISDICTION	1
PROVISIONS OF LAW INVOLVED	2
STATEMENT OF CASE AND FACTS	2
I. STATEMENT OF FACTS	2
II. STATEMENT OF CASE	6
EXISTENCE OF JURISDICTION BELOW	7
REASONS FOR GRANTING THE PETITION	7
I. THE COURT OF APPEALS' DECISION OF FIRST IMPRESSION AFFIRMING THE NAVY'S AUTHORITY TO VACCINATE CIVILIAN MARINERS DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND THEREFORE CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER	7
A. SUMMARY OF REASONS	7
B. THE NAVY DOES NOT HAVE THE AUTHORITY TO ORDER CIVILIAN MARINERS TO TAKE THE ANTHRAX VACCINE	8
CONCLUSION	14

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Brehmer v. Fed. Aviation Admin., 294 F.3d 1344 (Fed. Cir. 2002) 11, 12

FEDERAL STATUTES

5 U.S.C. § 7513(d) 7

5 U.S.C. § 7701(a) 7

5 U.S.C. § 7511(a)(1)(B) 7

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1295(a)(9) 7

TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Joseph V. Mazares and Michael R. Testman respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals which is the subject of this petition (App. 1-9) was filed on September 11, 2002, and is reported at 302 F.3d 1382 (Fed. Cir. 2002).

The final orders of the Merit Systems Protection Board were entered on July 16, 2001 (App. 13-15) and on July 17, 2001 (App. 10-12) and were not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Federal Circuit was entered on September 11, 2002 (App. 1-9). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

The Department of the Navy's authority to order civilian mariners to take the anthrax vaccine.

STATEMENT OF CASE AND FACTS

I. Statement of Facts

In November 1999, both Joseph V. Mazares ("Mazares") and Michael R. Testman ("Testman") were civilian mariners employed by the Military Sealift Command (MSC). The MSC operates a fleet of United States Naval Ships (USNS) throughout the world in direct support of the United States Navy.

Mazares and Testman were assigned to sail on the USNS KILAUEA, an ammunition ship operated by the MSC and manned by both civilian mariners (CIVMARs) and military personnel. The KILAUEA provides direct support for warships of the Navy's 7th Fleet, operating in the western Pacific Ocean. Specifically, the KILAUEA carries munitions for use aboard the aircraft carrier USS KITTY HAWK.

Mazares held the excepted civil service position of Able Seaman. In November 1999, he was 56-years-old and had been employed by the MSC for approximately eleven years. Mazares had also served three years on active duty in the United States Navy, during which time he had combat duty in Vietnam. While in Vietnam, Mazares was exposed to Agent Orange. He also suffers from asbestosis.

Testman held the excepted civil service position of Ordinary Seaman. In November 1999, he was 36-years-old and had been employed by the MSC for approximately one

year. He also previously served ten years on active duty in the United States Navy in an elite submarine force.

On November 8, 1999, Mazares, Testman and the rest of the Deck Department were informed by First Officer ("Chief Mate") Edward Dickenson that they were required to go in small groups to the ship's medical office to take the anthrax vaccine. The KILAUEA was sailing to a port in Korea to undergo a major overhaul. The Commander of the MSC directed that all members of the crew be vaccinated because Korea is considered a high-risk area for biological weapons.

Mazares was extremely apprehensive about taking the vaccine. As a result of previously suffering from pneumonia, being exposed to Agent Orange and having asbestosis, he was afraid that taking the vaccine would result in a debilitating disease. Moreover, since taking the vaccine was not a condition of his employment when he was hired, Mazares did not believe that it was lawful to force him to take the vaccine. Based on all of these factors, Mazares informed the medical office that he would not take the anthrax vaccine.

Similarly, Testman was extremely apprehensive about taking the vaccine. Four months earlier, in July 1999, he had also been ordered to take a dose of the vaccine.[1] He had initially refused, but changed his mind after the Captain told him that he would be removed from the ship and would be responsible for paying his own way back to the United States. After taking this first dose, Testman

[1] Mazares did not come aboard the ship until September 1999, and therefore was not a part of this earlier round of vaccinations.

experienced severe headaches, joint pain and swelling of his hands and feet. Two weeks later, after taking a second dose of the vaccine, he experienced similar symptoms.[2] Based on his two prior negative reactions to the anthrax vaccine, Testman informed Chief Mate Dickenson on November 8th that he would not take the vaccine again.

The next day, on November 9th, the Captain (the Master of the ship) held a meeting at which Chief Mate Dickenson, Mazares and Testman were all present. The Captain told Mazares and Testman that the issue was out of his hands, and he was merely the messenger delivering an order for them to take the vaccine. He further said that they would meet again in a week, and if they still refused to take the vaccine, then he would have no choice but to remove them from the ship and repatriate them.

On November 16th, Chief Mate Dickenson approached Mazares and Testman to confirm that they were still refusing to take the vaccine. After both stated that they would not take the vaccine, Chief Mate Dickenson told Mazares and Testman that he was sorry, but had orders from the Captain to sign them off the ship. Chief Mate Dickenson then thanked them for their hard work and told Mazares and Testman that both he and the Captain hoped to sail with them again. Finally, he told them that the Captain thought this issue was "a bunch of B.S."

On November 20, 1999, both Mazares and Testman were removed from the KILAUEA. In his Removal

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[2] The Anthrax vaccine is not fully effective until after three vaccinations on Day 0, Day 14 and Day 28. But Testman, for unknown reasons, was never required to take a third vaccination in July 1999.

Evaluation, the Captain stated the following regarding Mazares:

> Mr. Mazares is an excellent seaman. His greatest talent is his ability to take broken deck equipment and fix it, his maintenance skills are second to none. He requires no supervision and is a self starter. He is strong physically and has the ability to work long arduous hours stowing holds and operating forklifts during high optempo evolutions. His hard work was instrumental in the success of the KILAUEA during the recent Flint Ammunition Crossdeck and SMART inspection. He has a good working knowledge of damage control gear and has assisted the fire marshal in his duties. **His service aboard KILAUEA will be greatly missed and I look forward to sailing with him in the future.**

Similarly, in his Removal Evaluation regarding Testman, the Captain stated the following:

> Mr. Testman is currently sailing as ordinary seaman. He should be afforded the opportunity to upgrade to AB as soon as possible. Mr. Testman has excellent forklift operator skills and has assisted in the stowage of ammunition holds. He was a great help during the recent SMART Inspection and cross deck of T-Fill with the USNS Flint. He has great endurance and strength and is capable of working long hours during high optempo periods. **He has been a valuable asset to KILAUEA and I look forward to sailing with him in the future.**

In April 2000, the Navy removed both Mazares and Testman from federal civil service, primarily on the

ground that they had refused a direct order to take the anthrax vaccine while sailing on the KILAUEA.

II. Statement of Case

In May 2000, Mazares and Testman timely appealed the Navy's decision to the Merit Systems Protection Board.[3]

In September 2000, after conducting a one-day hearing, the Administrative Judge affirmed the Navy's decision, ruling that the Navy lawfully ordered Mazares and Testman to take the anthrax vaccine (App. 16-37 and App. 38-61).

In October 2000, Mazares and Testman petitioned for review before the Merit Systems Protection Board. In July 2001, the Board denied their petitions (App. 10-12 and App. 13-15).

In August 2001, Mazares and Testman filed Petitions for Review before the Federal Circuit Court of Appeals. On September 11, 2002, in an opinion reported at 302 F.3d 1382 (Fed. Cir. 2002), the Federal Circuit Court of Appeals affirmed the decision by the Merit Systems Protection Board to remove both Mazares and Testman from federal service.

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[3] Mazares' and Testman's appeals were concurrently heard by the Board, and the records of the two appeals were consolidated.

EXISTENCE OF JURISDICTION BELOW

The Merit Systems Protection Board had jurisdiction in this case under 5 U.S.C. §§ 7513(d) and 7701(a) because both Joseph Mazares and Michael Testman were "employees" as defined in 5 U.S.C. § 7511(a)(1)(B).

The Federal Circuit Court of Appeals had jurisdiction to hear this appeal under 28 U.S.C. § 1295(a)(9).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION OF FIRST IMPRESSION AFFIRMING THE NAVY'S AUTHORITY TO VACCINATE CIVILIAN MARINERS DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND THEREFORE CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

A. Summary Of Reasons

In March 1999, the Department of Defense ("DoD") issued a memorandum regarding the applicability of the anthrax vaccine to civilian employees:

> Effective immediately, the AVIP (Anthrax Vaccine Immunization Program) will be applied to all U.S. military personnel and Department of Defense (DoD) emergency essential civilian employees. . . . **Neither this policy nor the requirement to participate in AVIP is applicable to civilian employees or contractor personnel who are *not* designated as emergency essential.**

(App. 74-75) (emphasis added).

Despite the clarity of this memorandum, in October 1999, the Commander of the MSC issued a contrary message requiring CIVMARs to take the anthrax vaccine even though the Navy agrees that CIVMARs are *not* emergency essential employees. Until the DoD issues a supplemental memorandum requiring CIVMARs to take the anthrax vaccine, it is unlawful for the Navy to make a contrary order. Accordingly, the court's decision affirming the Navy's authority to vaccinate CIVMARs departs from the accepted and usual course of judicial proceedings and therefore calls for an exercise of this Court's supervisory power.

B. The Navy Does Not Have The Authority To Order CIVMARs To Take The Anthrax Vaccine

In 1993, the Secretary of Defense issued DoD Directive 6205.3, "DoD Immunization Program for Biological Warfare Defense" (App. 62-70). Under the Directive, the Assistant Secretary of Defense for Health Affairs has the responsibility to "issue instructions to the Military Departments . . . on the immunization of DoD personnel" (App. 65). Moreover, the Assistant Secretary of Defense for Health Affairs "shall direct the Secretaries of Military Departments to begin immunization of the DoD personnel against specific biological warfare threat agents" (App. 69-70). Nowhere in Directive 6205.3 did the Secretary ever **delegate** DoD authority to designate which personnel may be required to participate in an immunization program.

In 1997, the Secretary of Defense approved the implementation of the Anthrax Vaccination Program. In 1998, the Secretary promulgated the implementation in a

memorandum to the Secretaries of the Military Departments (App. 71-73). In his memorandum, the Secretary stated that "the Assistant Secretary of Defense for Health Affairs is responsible for the promulgation of medical standards, policies and protocols of the program" (App. 72). Nowhere in this memorandum did the Secretary ever **delegate** DoD authority to designate which personnel may be required to participate in the Anthrax Immunization Program.

In March 1999, the Assistant Secretary of Defense for Health Affairs issued a memorandum regarding the applicability of the anthrax vaccine to civilian employees:

> Effective immediately, the AVIP (Anthrax Vaccine Immunization Program) will be applied to all U.S. military personnel and Department of Defense (DoD) emergency essential civilian employees. . . . **Neither this policy nor the requirement to participate in AVIP is applicable to civilian employees or contractor personnel who are *not* designated as emergency essential.**

(App. 74-75) (emphasis added). The Navy *agrees* that neither Mazares nor Testman has ever been designated as an "emergency essential civilian employee" (App. 5).

In October 1999, however, the Commander of MSC authored the following message contradicting the Assistant Secretary of Defense's memorandum:

> The purpose of this msg is to delineate the MSC immunization (including anthrax) policy for civilian mariners (CIVMARs). . . . Phase I requires that personnel subject to deployment into high threat areas for any length of time be immunized for anthrax . . . all navy and military sealift

> command ships, including CIVMARs are subject to the same immunization req as deployable forces.

(App. 76-78).

In the present case, the Navy's Program Manager for AVIP testified at the one-day hearing held by the Administrative Judge ("AJ") regarding the Navy's authority to order CIVMARs to take the anthrax vaccine. During the hearing, the AJ asked the Program Manager if she could specifically provide him with any military authority that states CIVMARs may be required to take the anthrax vaccine. The Program Manager testified, "No, your honor."

However, the Program Manager testified that her "interpretation" of BUMEDINST 6230.15 provided the Navy with the authority to order CIVMARs to take the anthrax vaccine. In 1995, the Navy Surgeon General promulgated BUMEDINST 6230.15 to establish general principles, procedures, policies, and responsibilities for the Navy's immunization program (App. 80-87). BUMEDINST 6230.15 provides that CIVMARs are subject to the same immunization requirements as all "alert forces" (App. 85). **The word "anthrax," however, does not appear anywhere in BUMEDINST 6230.15.** Moreover, the Assistant Secretary of Defense for Health Affairs issued the memorandum regarding the applicability of the anthrax vaccine to civilian employees in March 1999, three years **after** the promulgation of BUMEDINST 6230.15. Therefore, the DoD's memorandum supercedes anything stated to the contrary in BUMEDINST 6230.15.

The court of appeals, however, for the following reasons affirmed the Navy's decision to remove both Mazares and Testman from federal service for refusing to

take the anthrax vaccine. First, the court stated that the "policy" issued by the DoD regarding the applicability of the anthrax vaccine to civilian employees is "just that," and therefore is not a "black letter rule" that the Navy is always required to follow (App. 6). To support this proposition, the court cites *Brehmer v. Fed. Aviation Admin.*, 294 F.3d 1344 (Fed. Cir. 2002).[4]

In *Brehmer*, an air traffic controller was terminated after making three different operational errors. The air traffic controller asserted that her termination was improper because the Federal Aviation Administration (FAA) had a "general policy" of dealing with operational errors by corrective training rather than disciplinary action. The court held that the FAA's "general policy" did not require it to give the air traffic controller additional training because a "policy" is not a "black letter rule" that is required to be followed by the FAA in all cases without regard to the circumstances of the particular situation before it.

In the present case, the court's reliance on *Brehmer* is misplaced. In *Brehmer*, the issue was whether the FAA had properly followed its *own* "general" employment procedures when removing the air traffic controller from service. In contrast, the issue here is whether the Navy properly applied the "*specific*" intent of the memorandum issued by the DoD, *a superior agency*: "Neither this policy nor the requirement to participate in AVIP is applicable to civilian employees or contractor personnel who are *not*

[4] *Brehmer* was decided approximately two months before the instant case, and the circuit judge who drafted the opinion in *Brehmer* also drafted the opinion in the instant case.

designated as emergency essential." Nothing in this statement could reasonably be construed to mean that the DoD did not intend for all *subordinate* military departments including the Navy to follow its policy on civilian anthrax vaccinations. Accordingly, the court's reliance on *Brehmer* for the proposition that the Navy is not required to follow the "*specific*" DoD policy on anthrax vaccination because a "policy" is not a "black letter rule" clearly departs from the accepted and usual course of judicial proceedings.

Second, the court in support of its decision states that the anthrax policy issued by the DoD did not "either explicitly or by necessary implication" prohibit the Navy from vaccinating civilian employees who are not designated as "emergency essential," but states only that the DoD's general policy does not cover these employees (App. 6). Once again, the DoD policy clearly states, "**Neither this policy nor the requirement to participate in AVIP is applicable to civilian employees or contractor personnel who are not designated as emergency essential.**" Therefore, contrary to the court's assertion, the memorandum does say that *only* civilian employees who are designated as "emergency essential" may be required to take the anthrax vaccine.

Third, the court states that there is ample authority in the appropriate Navy regulations and directives for the Navy to require all civilian employees, including those not designated as "emergency essential," to take the anthrax vaccine (App. 6-7). The court cites DoD Directive 6205.3, "DoD Immunization Program for Biological Warfare Defense" to support this proposition (App. 62-70). Contrary to the court's assertion, as previously discussed under this Directive, the *Assistant Secretary of Defense for*

Health Affairs [*not* the Navy] has the responsibility to "issue instructions to the Military Departments . . . on the immunization of DoD personnel" (App. 65). Moreover, the Assistant Secretary of Defense for Health Affairs "shall direct the Secretaries of Military Departments to begin immunization of the DoD personnel against specific biological warfare threat agents" (App. 69-70). This is precisely what the Assistant Secretary did when he issued the memorandum stating that *only* civilian employees who are designated as "emergency essential" may be required to take the anthrax vaccine. Therefore, nothing in DoD Directive 6205.3 supports the court's assertion that the Navy may contradict DoD policy by ordering civilian employees *not* designated as "emergency essential" to take the anthrax vaccine.

Additionally, the court states that the Navy issued an instruction that authorized immunization against all biological threats for "alert forces," including CIVMARS (App. 7).[5] However, as previously discussed nowhere in BUMEDINST 6230.15 is it specifically stated that CIVMARs may be required to take the anthrax vaccine (App. 80-87). In fact, nowhere in BUMEDINST 6230.15 is the word "anthrax" even mentioned. Finally, the March 1999 memorandum issued by the Assistant Secretary of Defense for Health Affairs supercedes BUMEDINST 6230.15 promulgated in November 1995. Therefore, the court's reliance on BUMEDINST 6230.15 to support its

[5] The court is referring to BUMEDINST 6230.15 (App. 80-87 and specifically App. 86), but in its opinion it did not expressly state this citation.

conclusion that the Navy may order CIVMARs to take the anthrax vaccine is misplaced.

Finally, the court states that the Navy had previously issued a specific instruction relating to anthrax which authorized mandatory vaccination for civilian employees having status equivalent to deployable forces (App. 6).[6] However, the same instruction states, "Immunization against anthrax is indicated for those employees (DON civilians) whose duties classify them '*Mission Essential*' and place them at risk for exposure to anthrax used as a biological weapon in a combat or operational setting" (emphasis added) (App. 89). Mazares and Testman have *never* been designated as "*Mission Essential*" employees and the Navy has *never* made a contrary assertion. In fact, the term "*Mission Essential*" is not defined in any regulation or law. Nonetheless, even if Mazares and Testman were considered "*Mission Essential*" personnel, and thus subject to anthrax vaccinations in 1998, the Assistant Secretary of Defense's 1999 memorandum, which exempts *all* essential civilian personnel from anthrax vaccinations except those designated as "emergency essential," *supercedes* this earlier Navy instruction.

CONCLUSION

For all of the reasons stated herein, the court's first impression decision affirming the Navy's authority to vaccinate CIVMARs departs from the accepted and usual

[6] The court is referring to SECNAVINST 6230.4 (App. 88-90), but in its opinion it did not expressly state this citation.

course of judicial proceedings and therefore calls for an exercise of this Court's supervisory power. Accordingly, this petition for writ of certiorari should be granted.

Dated: December 3, 2002

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

01-3337, -3338

JOSEPH V. MAZARES, JR.,

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v.

DEPARTMENT OF THE NAVY,

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MICHAEL R. TESTMAN,

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v.

DEPARTMENT OF THE NAVY,

Respondent.

DECIDED: September 11, 2002

Before RADER, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

FRIEDMAN, *Senior Circuit Judge*.

The Department of the Navy removed two civilian seamen it employed aboard a naval ship because they disobeyed an order to be vaccinated against anthrax. The Merit Systems Protection Board ("Board") upheld both removals. So do we.

I

A. The facts found by the Board's administrative judge are not disputed.

The petitioners Mazares and Testman were employed by the Military Sealift Command aboard the naval ship Kilauea. The crew was approximately eighty percent civilian mariners (known in Navy lexicon as CIVMARs) and twenty percent military personnel. The Kilauea carried ammunition, which it supplied to an aircraft carrier operating in the western Pacific Ocean.

The Kilauea was headed for a port in Korea, where it was scheduled to undergo a major overhaul. Because Korea was considered a high-risk area for biological weapons, the Commander of the Military Sealift Command ordered that all members of the crew, civilian and military, be vaccinated against anthrax.

The chief mate, who was the immediate supervisor of Mazares and Testman, ordered them to report to the Medical Services Officer to be vaccinated. He told them that if they had "questions" they should ask the Medical Officer. They refused to take the vaccination.

The next day they and the chief mate met with the captain. He stated that he was just carrying out his instructions in requiring the vaccination, and warned them that if they failed to take the vaccine, they would be charged with "violating an order." He stated they would meet again in one week.

During the next week the chief mate repeatedly urged them to take the vaccine, but they continued to refuse. At the end of the week, when they still refused, he told them

he had "orders" from the captain to "sign [them] off the ship."

B. They were both then transferred from the ship and repatriated to California. The Navy then instituted removal proceedings against them.

In response to the notices of proposed removal, each of them admitted he had received the vaccination order and disobeyed it, but offered justifications for his conduct that, he asserted, entitled him to a medical waiver. (The Navy permits vaccination requirements to be waived for medical reasons.) Mazares stated that he suffered from asbestosis and had been exposed to Agent Orange during his military service in Vietnam. Testman stated that he previously had received the first two doses of the series required for anthrax vaccination, and that each time he had suffered headaches and body pains (he continued to work nevertheless).

The Navy cancelled the proposed removals and investigated Mazares's and Testman's claims. It concluded, however, that neither of them was entitled to a medical waiver of the vaccination requirement and, after full administrative proceedings, removed both of them "for failure to obey a direct order to receive mandatory injections of an anthrax immunization vaccine."

Mazares and Testman each appealed his removal to the Board. The same administrative judge heard both cases. In his initial decisions, which became final when the Board refused to review them, the administrative judge upheld the removals.

In detailed opinions, he held that the Navy had proved by preponderant evidence its charges that Mazares

and Testman "willfully and intentionally refused the order of a superior officer." He rejected their contention that the order was unauthorized, finding that the Navy "had full authority to order the appellant[s] to submit to anthrax vaccination, and immediate vaccination became a requirement of the appellant's CIVMAR position when KILAUEA was ordered to land in Korea, which had been designated a high-threat area." He noted that their "subjective fear of vaccination was not sufficient to excuse [their] failure to obey a direct order." The administrative judge "conclude[d] that the vaccination orders were lawful, and the agency had a right to have them obeyed."

Finally, the administrative judge upheld the penalty of removal. He concluded that the officer who selected the penalty "considered the relevant factors and exercised his discretion within tolerable limits of reasonableness. Under the circumstances, I cannot find that his choice of penalty was so excessive as to be an abuse of discretion, or that it exceeds the maximum reasonable penalty under the circumstances." (citations omitted).

II

Mazares and Testman here challenge their removals on two grounds. They contend (A) that the order to receive the anthrax vaccine was unauthorized and therefore they could not be punished for disobeying it, and (B) that the penalty of removal was excessive.

A. Their challenge to the validity of the orders rests primarily upon a one-page March 30, 1999, memorandum from the Assistant Secretary of Defense to the Secretaries of the Army, Navy, and Air Force. The subject of the

memorandum was "Change to Anthrax Vaccine Immunization Program (AVIP) Operation Procedure (One Day Policy) Schedule." They rely upon the first paragraph of the memorandum, which stated:

> Effective immediately, the AVIP will be applied to all U.S. military personnel and Department of Defense (DoD) emergency essential civilian employees and contractor personnel assigned, deployed or on temporary duty in the high threat areas and contiguous waters of South-west Asia (Kuwait, Saudi Arabia, Bahrain, Jordan, Qatar, Oman, UAE, Yemen, and Israel) and the Korean Peninsula for any period of time. Prior to entry into the designated high threat areas these personnel must initiate vaccination against anthrax in accordance with the prescribed Immunization schedule. Ideally, personnel should receive at least the first three vaccinations in the series. In those rare circumstances when an Individual is not able to take or continue with the anthrax vaccination for medical or administrative reasons, they will be evaluated for deployability in accordance with Service criteria. Neither this policy nor the requirement to participate in AVIP is applicable to civilian employees or contractor personnel who are not designated as emergency essential.

Since it is conceded that Mazares and Testman have not been designated as "emergency essential" employees, they contend that the captain of the Kilauea had no authority to order them to receive the anthrax vaccine. They particularly stress the last section of the first paragraph, which states that "[n]either this policy nor the requirement to participate in AVIP is applicable to civilian

employees or contractor personnel who are not designated as emergency essential."

As this court recently stated, although in a different context, "[a] 'policy' is just that, however. It indicates the standards an agency generally will follow in conducting its operations. It is not, however, a black letter rule that the agency is required to follow in all cases without regard to the circumstances of the particular situation before it." *Brehmer v. Fed. Aviation Admin.*, 294 F.3d 1344, 1348 (Fed. Cir. 2002). Those words are equally applicable to the present case.

The memorandum states the general policy the services are to follow in administering the anthrax vaccine to military and civilian personnel and the policy is inapplicable to non-"emergency essential" civilian employees. It does not, however, either explicitly or by necessary implication, prohibit anthrax vaccination of such civilian employees, i.e., those who are not designated "emergency essential." It states only that the Department's general policy providing for anthrax vaccination does not cover those employees.

There is ample authority in the appropriate Navy regulations and directives for the Navy to require all civilian employees, including those not designated "emergency essential," to receive the anthrax vaccine when the Navy determines that such action is necessary and appropriate to protect the health of such employees. In a written policy that antedated the March 30, 1999, memorandum upon which Mazares and Testman rely, the Department of Defense provided for the immunization of personnel expected to enter certain "high-threat areas" – referring to areas "in the proximity of a nation or nations considered to

pose a potential biological threat to DoD personnel by the Chairman of the Joint Chiefs of Staff in consultation with the Commanders of the Unified Commands and the Director, DIA." DoD Directive 6205.3, "DoD Immunization Program for Biological Warfare Defense" (Nov. 26, 1993). The Secretary of the Navy then issued an instruction that authorized immunization against biological threats for all "alert forces," including civilian mariners. The Department of the Navy also issued an instruction specifically relating to anthrax, which authorized mandatory vaccination for "Federal civilian employees and other groups having status equivalent to deployable forces serving under the auspices of the [Department of the Navy]. . . . [I]n certain instances, anthrax immunization might be determined by the appropriate authority to be a condition of [civilian] employment."

Finally, the Commander of the Military Sealift Command issued an order dated October 14, 1999, that stated that "[t]he basic immunization series for deployable Naval Forces, including anthrax, is a requirement for all MSC CIVMARs unless medically waived." This order directed also that immunization was to begin immediately for those personnel "subject to deployment into high threat areas for any length of time." It was pursuant to this order, a copy of which was sent to the Kilauea, that the captain of that vessel ordered Mazares and Testman to be given the anthrax vaccination.

The military has broad authority and discretion in dealing with its personnel, both military and civilian, including the protection of their health. The Navy did not exceed its authority or otherwise abuse its discretion by ordering Mazares and Testman to undergo anthrax vaccination.

B. The penalty of removal was neither unauthorized nor excessive. The misconduct for which Mazares and Testman were removed was "failure to obey a direct order to receive mandatory injections of an anthrax immunization vaccine." That misconduct constituted insubordination, which this court defines as a "willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed." *Bieber v. Dep't of the Army,* 287 F.3d 1358, 1364 (Fed. Cir. 2002).

Insubordination is a serious offense that disrupts the work place and interferes with and threatens the ability of the work force to perform its duties. Its adverse impact is particularly serious in the military, where prompt obedience to lawful orders is essential, especially aboard a ship. In this case, there was a clear and unjustified refusal to obey the lawful order of a superior. There can be no question that the removal of Mazares and Testman was "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513 (2000).

"Our statutory scope of review [of penalties] is narrow. Determination of an appropriate penalty is a matter committed primarily to the sound discretion of the employing agency." *Connolly v. Dep't of Justice,* 766 F.2d 507, 514 (Fed. Cir. 1985) (citing *Miguel v. Dep't of the Army,* 727 F.2d 1081, 1083 (Fed. Cir. 1984)). *See also Brown v. Dep't of the Navy,* 229 F.3d 1356 (Fed. Cir. 2000). Unless the penalty is totally unwarranted or grossly disproportionate to the misconduct, we will not overturn it. *See Mings v. Dep't of Justice,* 813 F.2d 384, 390 (Fed. Cir. 1987); *Miguel v. Dep't of the Army,* 727 F.2d 1081, 1083 (Fed. Cir. 1984).

Here, as the Board noted, the agency considered all the relevant factors set forth in *Douglas v. Veterans*

Admin., 5 M.S.P.R. 280 (1981), in deciding to remove Mazares and Testman. The agency "considered" the employees' fifteen and eleven years, respectively, of "honorable and dedicated service," their prior "naval status" and their "excellent evaluations." The deciding officer stated that although each of them had been an "outstanding" civilian mariner, he found that "there is no basis for your failure to receive mandatory injections of the anthrax immunization vaccine." He also explained: "I have lost confidence in your ability to perform at a satisfactory level due to your refusal to take the anthrax vaccine. Also, the nature of the offense causes me to question your reliability and weakens my confidence in your ability to carry out your duties . . . during future missions where this vaccine is required."

The Board correctly determined that the agency-imposed penalty of removal did not "exceed[ ] the maximum reasonable penalty under the circumstances."

CONCLUSION

The decision of the Board is

AFFIRMED.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH V. MAZARES, JR.,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
SF-0752-00-0445-I-1

DATE: **JUL 17 2001**

Tim S. McClain, Esquire, La Jolla, California, for the appellant.

Sandra Patterson-Jackson, Esquire, Virginia Beach, Virginia, for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHAEL R. TESTMAN,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
SF-0752-00-0445-I-1

DATE: **JUL 16 2001**

Tim S. McClain, Esquire, La Jolla, California, for the appellant.

Sandra Patterson-Jackson, Esquire, Virginia Beach, Virginia, for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

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You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

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Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

JOSEPH V. MAZARES, JR.,

Appellant,

v.

DEPARTMENT OF THE NAVY,

Agency.

DOCKET NUMBER
SF-0752-00-0445-I-1

DATE:
September 1, 2000

Tim S. McClain, Esquire, La Jolla, California, for the appellant.

Sandra Patterson-Jackson, Esquire, Virginia Beach, Virginia, for the agency.

BEFORE
Philip D. Reed
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed the agency's action that removed him from the excepted service position of Able Seaman. He is a preference-eligible who occupied the same or similar position for more than one year,[1] and is therefore an "employee" as defined in 5 U.S.C. § 7511(a)(1)(b). The Board has jurisdiction under 5 U.S.C.

[1] Initial Appeal File (IAF), Vol. 1, Tab 1; *id.*, Vol. 4, Tab 5 ("Agency File"), Subtabs 1, 4a; Official Hearing Tapes (H.T.), testimony of appellant.

§§ 7513(d) and 7701(a). A hearing was held on August 17, 2000.

For the reasons explained below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

At the time of his removal the appellant had been employed by the agency's Military Sealift Command (MSC) for approximately eleven years, with no prior discipline and a record of satisfactory or better performance. He also served for approximately three years as a uniformed member of the United States Navy, for a total of approximately fourteen years of combined federal service.

On December 23, 1999, the agency proposed his removal on a single charge of "failure to obey a direct order to receive mandatory injections of an anthrax immunization vaccine," supported by two specifications: (1) "On 16 November 1999, while aboard USNS KILAUEA (TAE 26), you were scheduled to receive an injection of the anthrax vaccine. You refused to be vaccinated with the anthrax vaccine"; and (2) "Captain J.A. Cook, Master, USNA KILAUEA (TAE 26), gave you a direct order to be vaccinated, and advised you that failure to obey the order was a serious offense and would result in the initiation of removal procedures. You again refused."[2]

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[2] Agency File, Subtab 4o.

In reply to the proposed removal, the appellant acknowledged that he had been ordered to report for the vaccination in question, and refused to do so. He contended, however, that he should not be disciplined because the vaccination program was illegal as applied to himself, and also violated his constitutional right to equal protection under the law.[3] In addition, he requested waiver of the vaccination requirement on medical grounds, and accommodation of alleged medical conditions of asbestosis and the effects of exposure to Agent Orange during his military service.[4] Having considered these arguments, the agency carried out his removal effective April 11, 2000.[5]

On appeal, the appellant continues to maintain that the vaccination order was illegal, and his refusal to obey that order was obtained by "duress." He also raises affirmative defenses including alleged violations of his procedural and constitutional rights, and a de facto claim of illegal discrimination on the basis of disability.[6]

The agency has proven its charge of failure to obey a direct order by preponderant evidence.

The agency bears the burden of proving its charge by preponderant evidence. 5 C.F.R. § 1201.56(a). Here, I find that "failure to obey a direct order" is tantamount to a charge of insubordination, which has been defined as "a willful and intentional refusal . . . to obey an authorized

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[3] *Id.*, Subtab 4j.

[4] *Id.*, Subtabs 4e, 4f, 4h.

[5] *Id.*, Subtabs 4a, 4b.

[6] IAF, Vol. 2, Tab 18.

order of a superior officer which the officer is entitled to have obeyed." *Phillips v. General Services Administration,* 878 F.2d 370, 373 (Fed. Cir. 1989) (Emphasis omitted.) Thus, the agency must prove intent in order to support its charge. *Id.*

The KILAUEA is an ammunition ship, operated by MSC and manned by both civilian mariners (CIVMARs) and military personnel.[7] At the time in question it was providing direct support for warships of the Navy's 7th Fleet, operating in the western Pacific Ocean. Its primary mission was to carry munitions for use aboard the aircraft carrier USS KITTY HAWK.[8] In approximately October 1999 the KILAUEA was ordered to proceed to a port in Korea to undergo a major overhaul. Insofar as Korea was considered a high-risk area for biological weapons, including anthrax, the Commander of MSC directed that all members of the crew be vaccinated against anthrax.[9]

According to the both the appellant and another CIVMAR, Ordinary Seaman Michael Testman,[10] the following events ensued. On November 8, 1999, they and

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[7] The ship's medical officer estimated that at the time in question the crew of the KILAUEA numbered approximately 100 persons, approximately 80% of whom were civilians and 20% were uniformed service members. H.T., testimony of Jensen.

[8] *Id.*, testimony of Cook.

[9] *Id.*

[10] Mr. Testman also refused the vaccine, and was removed from his position on that basis. For purposes of administrative economy his Board appeal, Docket No. SF-0752-00-0451-I-1, was heard concurrently with this one. IAF, Vol. 1, Tab 3; Vol. 2, Tab 18; H.T., opening remarks of administrative judge. For ease of reference, the records of the two appeals are hereby consolidated.

the rest of the Deck Department were told by the ship's First Officer or "Chief Mate," Edward Dickerson, to go to the office of the ship's Medical Service Officer (MSO), Thomas Jensen, and receive the vaccine, the appellant for the first time and Mr. Testman for the third. The appellant testified further that Chief Mate Dickerson said they were to go in "groups of three," if they had "questions, ask the MSO," and if they "refused" then "discipline" would ensue. The appellant also testified that he went to see MSO Jensen as ordered, but told him that he was "not going to take the shot." Mr. Testman testified that he told Chief Mate Dickerson, "I don't want to take the shot," and never went to see the MSO.[11]

Both testified further that the next day, Chief Mate Dickerson summoned them to a meeting with himself and the Master of the vessel, captain Jeffrey Cook, in Captain Cook's office. At that time, Captain Cook told them that the matter was "out of [his] hands, [he] was merely the messenger," and had been "ordered to issue [them] an order" to take the vaccine, and "those who refuse will be charged with violating an order." Captain Cook also told them that they would "meet here again in one week," and "if [they] refuse[d]" at that point, he would "have no choice. I have my orders too," he reportedly stated.[12]

For the next week Chief Mate Dickerson repeatedly urged both sailors, in a good-natured but "emphatic" manner, to take the vaccine. At the end of the week he approached them and one other civilian who had also

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[11] *Id.*, testimony of appellant, Testman.

[12] *Id.*, testimony of appellant.

refused and said, grinning, "You guys aren't going to take the shot, are you?" All three stated that they would not. Chief Mate Dickerson then told them that he was "sorry," but he had orders from Captain cook to "sign [them] off" the ship. He thanked them for their good work, and said both he and the Captain "hoped to sail with [them] again," adding, "[Captain Cook] thinks this is a bunch of B.S."[13]

Chief Mate Dickerson and Captain Cook confirmed this account in all important respects.[14] I therefore find that the agency has shown by preponderant evidence that the appellant was directed by Chief Mate Dickerson, and then by Captain Cook, to go to the MSO's office and be vaccinated for anthrax, and in each instance he intentionally refused to do so. I therefore conclude that on each occasion the appellant willfully and intentionally refused the order of a superior officer. *See Phillips*, 878 F.2d at 373.

It remains to be seen, however, whether the vaccination order was "authorized." *Id.* The appellant maintains that it was not because, with one exception not applicable

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[13] *Id.*, testimony of appellant, Testman.

[14] *Id.*, testimony of Dickerson, Cook. Both recalled that the meeting in the Captain's office took place at the end of the one-week grace period, rather than the beginning. *Id.* This is contrary to a contemporaneous e-mail message from Captain Cook, which supports the chronology given by the appellant and Mr. Testman. IAF, Vol. 2, Tab 22, Exhibit 1, at 3-4. In any event, I find that the precise dates and order of events are immaterial, insofar as the events themselves are admitted. *See Aiu v. Department of Justice,* 70 M.S.P.R. 509, 519, *aff'd*, 98 F.3d 1359 (Fed.Cir.1996) (Table) (agency need only prove the essence of its charge, not every factual specification).

here,[15] MSC allegedly lacked authority to order its civilian mariners to take the anthrax vaccine. To put it another way, he maintains that his insubordination resulted from an unlawful order, and was therefore procured by "duress."[16] *See, e.g., Gomez v. Department of Agriculture*, 63 M.S.P.R. 36, 38-39 (1994).

As a preliminary matter, I find that the Board lacks authority to review the underlying reasons for the vaccination order, or rule on its merits. Captain Cook testified without contradiction that at the time in question, Korea had been designated a high-threat area for biological weapons, and in the expectation that KILAUEA would soon land there, he was ordered by the Commander of MSC to immunize his crew against anthrax.[17] Record evidence establishes that the Commander of MSC derives authority to make such an order from the Secretary of the Navy and the Chief of Naval Operations,[18] and the designation of high-threat areas is a matter reserved for Chairman of the Joint Chiefs of Staff, which is the highest level of military command short of the President.[19] Accordingly, I find that the decision to require anthrax vaccination bore directly on military operations, required special expertise, and is not subject to Board review. *See Jacobs v.*

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[15] Under applicable regulations the agency was authorized to vaccinate civilians who had been designated "emergency essential" personnel. *See* IAF, Vol. 3, Tab 27, at 15; *id.*, Vol. 2, Tab 20, at 8.

[16] *Id.*, Tabs 16, 20.

[17] H.T., testimony of Cook.

[18] IAF, Vol. 2, Tab 22, Enclosure 4.

[19] *Id.*, Vol. 1, Tab. 11, Appendix D; *id.*, at subsection E2.1.3.

Department of the Army, 62 M.S.P.R. 688, 692-93 (1994); *Mindes v. Seaman*, 453 F.3d 197, 199-201 (5th Cir. 1971).

Nonetheless, in a case such as this, the Board may inquire into whether the military requirement in question was, in fact, a requirement of the position encumbered by the appellant. *Archer v. Department of the Army*, 44 M.S.P.R. 427, 430 (1990); *Bolineau v. Department of the Army*, 57 M.S.P.R. 244, 248 n.6 (1993). For reasons that follow I find that it was, and that the authority to order such vaccinations was clearly delineated in the applicable regulations.

Under 5 C.F.R. § 339.205, agencies are authorized to establish "immunization programs by written policies or directives to safeguard the health of employees whose work may subject them or others to significant health or safety risks due to occupational or environmental exposure or demands." *Id.* The Department of Defense (DoD) has issued a written policy which provides for immunization against biological weapons whenever DoD personnel are expected to enter a "high threat area" defined as a "geographic area in the proximity of a nation or nations considered to pose a potential biological threat to DoD personnel by the Chairman of the Joint Chiefs of Staff in consultation with the Commanders of the Unified Commands and the Director, DIA."[20] The military departments, including the Department of the Navy, have jointly issued an instruction that implements this policy, and specifically authorizes immunization against biological threats for all "alert forces," including "all Navy and Military Sealift

[20] *Id.*

Command Ships (including civilian mariners). . . . "[21] The Department of the Navy also issued a further instruction specific to anthrax, that authorizes mandatory vaccination of "Federal civilian employees and other groups having status equivalent to deployable forces serving under the auspices of the [Department of the Navy]," and further provides, " . . . [I]n certain instances, anthrax immunization might be determined by the appropriate authority to be a condition of [civilian] employment."[22] This, in turn, was implemented within MSC by an order transmitted on October 14, 1999, stating that "[t]he basic immunization series for deployable Naval Forces, including anthrax, is a requirement for all MSC CIVMARs unless medically waived"; and that immunization was to begin immediately for "personnel subject to deployment into high threat areas for any length of time."[23] Thus, I find that the agency had full authority to order the appellant to submit to anthrax vaccination, and immediate vaccination became a requirement of the appellant's CIVMAR position when KILAUEA was ordered to land in Korea, which had been designated a high-threat area. *See Archer*, 44 M.S.P.R. at 430.

The appellant also maintains that when he refused the order, he was concerned that the vaccine might cause an adverse reaction, and he had not received "any information, training or briefing on the safety of the drug. . . . "[24] I find, however, that such information was available from

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[21] *Id.*, Appendix A, at 5, 9.

[22] *Id.*, Appendix B, at G-1.

[23] *Id.*, Appendix F, at 3.

[24] *Id.*, Vol. 2, Tab 20, at 5.

Chief Mate Dickerson and the MSO;[25] when the appellant was first directed to take the vaccine, he was told to "ask the MSO" if he had questions about it;[26] yet the appellant never did so, despite having an additional week to consider the matter.[27] Under the circumstances, I find that his subjective fear of vaccination was not sufficient to excuse his failure to obey a direct order. *See Gomez*, 63 M.S.P.R. at 38-39, *citing Haymore v. Department of the Navy*, 9 M.S.P.R. 499, 504-505 (1982).

For all of the above reasons I conclude that the vaccination orders were lawful, and the agency had a right to have them obeyed. Thus, the charge of failure to obey a direct order is sustained as to both specifications. *Phillips*, 878 F.2d at 373.

The appellant's defense of harmful procedural error is not sustained.

The appellant also contends that the agency committed harmful procedural error in the application of "DOD directives and SECNAV instructions" pertinent to the vaccination program, and in failing to adhere to "FDA certification regulations."[28]

Harmful error cannot be presumed: The burden is on the appellant to show that the agency committed an error

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[25] H.T., testimony of Dickerson, Jensen; IAF, Vol. 2, Tab 22, Exhibit 2.

[26] H.T., testimony of appellant.

[27] *Id.*

[28] IAF, Vol. 2, Tabs 16, 18, 20.

in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See* 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681, 685 (1991).

The appellant contends that he "did not receive information on the anthrax vaccine or the AVIP program as required by" DOD and agency directives.[29] Assuming that such a requirement exists, I find that it was not violated in this case, because the appellant was told how to obtain such information and failed to do so. He also argues that the agency erred in failing to designate him as "Emergency Essential Personnel" (EEP), because the only civilians who may properly be vaccinated for anthrax are EEP.[30] It is undisputed that MSC has not designated its CIVMARs as EEP,[31] and a DoD memorandum dated March 30, 1999, directed immediate anthrax vaccination for "all U.S. military personnel and Department of Defense (DoD) emergency essential civilian employees and contractor personnel" assigned to high-threat areas, including the Korean Peninsula.[32] However, it does not follow that among civilian employees only EEP may be vaccinated,

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[29] *Id.*, Tab 16.

[30] Under DoD regulations issued in 1992, EEP are defined as civilian employees who are "located overseas or . . . would be transferred overseas during a crisis situation or . . . [are required] to deploy or to perform temporary duty assignments overseas during a crisis in support of a military operation." DoD Directive 1404.10, Enclosure 2, section E2.1.5., at IAF, Vol. 3, Tab 27, Appendix O.

[31] *Id.*, Vol. 1, Tab 11, at 12.

[32] Agency File, Subtab 4j, Exhibit F.

and others may not, even though they are deployed to high-threat areas. The memorandum in question says no such thing, nor does it invalidate the DoD instructions cited above, that specifically authorize anthrax vaccination of CIVMARs.[33] I therefore find that the appellant has not shown error in this regard.

The appellant also contends that he "was entitled to a medical exemption from the [vaccination] program" based on his medical history of asbestosis and exposure to Agent Orange, and the agency erred in failing to grant one.[34] The appellant did not formally request a waiver at the time he refused the vaccination order. His request was not made until months later, after the agency had proposed his removal, and indeed, after it had issued the first of two decisions removing him from the position. When he requested a waiver, the appellant rescinded its decision letter and invited him to provide medical evidence to substantiate his request.[35] Two weeks later he submitted a summary evaluation from an emergency room physician who apparently saw him just once, after the decision was issued.[36] Nonetheless, Force Medical Officer Captain John Rowe, M.D., took the request seriously, and researched whether asbestosis or Agent Orange exposure might increase one's sensitivity to the vaccine; however, he could find nothing to substantiate this, either in the medical literature or in consultation with others knowledgeable in

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[33] IAF, Vol. 1, Tab 11, Appendix A, at 5, 9.

[34] Agency File, Subtab 4j, Exhibit F. *Also see, e.g.*, IAF, Vol. 1, Tab 11, Appendix A, at 4 (typical waiver provision).

[35] H.T., testimony of appellant; Agency File, Subtabs 4b, 4h, 4i.

[36] *Id.*, Subtab 4f.

the field. Accordingly, Dr. Rowe advised Mr. Countryman that no exemption was warranted.[37] I therefore find that the appellant failed to show that the agency erred by denying him a medical exemption. *Id.*

With regard to "FDA certification regulations," the appellant maintains that the anthrax "vaccine as formulated in November 1999 . . . is an 'experimental drug,' or was used for unapproved purposes," and the agency therefore erred in ordering him to take it without his "informed consent." In response, the agency asserts that the anthrax vaccine has been licensed since 1970.[38] The appellant agrees, but asserts that the "license applies only to the use for which the vaccine was licensed," which was to prevent anthrax contracted through skin exposure.[39] He then assumes, without support in the record, that the "biological warfare threat" in Korea involves exposure to anthrax by inhalation rather than skin contact; and asserts that since the vaccine has not been tested against the former, its use in this case was "experimental."[40]

Neither the appellant nor the Board is in a position to assess the exact nature of the threat in question. As stated above, this is a military question which is beyond our ken.

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[37] H.T., testimony of Rowe; Agency File, Subtabs 4c through 4h. Although the appellant's emergency room physician was approved to testify as a witness, he failed to appear at hearing without good cause; thus, he was not heard. H.T., remarks of administrative judge prior to closing arguments.

[38] IAF, Vol. 1, Tab 11, "Motion to Limit Issues, etc.," at 5-6, *citing O'Neil v. Secretary of the Navy*, 76 F.Supp.2d 641, 645 (W.D.Pa.1999).

[39] IAF, Vol. 2, Tab 20, at 3.

[40] *Id.*, at 4.

See Jacobs, 62 M.S.P.R. at 692-93. I also am not convinced by his analysis that a military command may not, under appropriate circumstances, order a civilian employee to take an experimental vaccine in order to safeguard its military forces, as well as his own life. Indeed, the Navy regulation concerning vaccination against biological weapons clearly contemplates such an occurrence.[41] Thus, the appellant has not shown that the use of the anthrax vaccine aboard USNS KILAUEA was unlicensed, or otherwise violated requirements for "FDA certification."

The appellant's constitutional defenses are outside the scope of Board review in this case, and in any event, they would not be sustained.

The appellant also maintains that his removal should be reversed because in carrying out the vaccination program, the agency violated his U.S. Constitutional rights to equal protection, due process and privacy.[42]

With respect to equal protection, he alleges that the agency "implemented the anthrax program in a discriminatory manner," in that it did not provide CIVMARs with the "protections" provided under DoD regulations, which allegedly prohibit anthrax vaccination of civilian employees except those designated as EEP; and because senior officers on the USNS KILAUEA were allegedly excused from the program because of their rank.[43] He has produced no evidence to support the latter assertion; indeed, the

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[41] *Id.*, Vol. 1, Tab 11, Appendix A, Section F, subparagraph 49.5.

[42] *Id.*, Vol. 2, Tab 18, at 4.

[43] *Id.*, Tab 20, at 6-7.

Master and Chief Mate both testified that they were vaccinated for anthrax.[44] With regard to the former, I have found above that the provision for vaccinating EEP was non-exclusive, and the applicable instructions specifically authorize MSC to vaccinate CIVMARs.[45] In a similar vein, the appellant argues that the agency's alleged violation of DoD vaccination procedures also constituted a denial of due process.[46] Again, I find that MSC had full authority to vaccinate CIVMARs, under DoD regulations and its own.

Finally, the appellant cites *Roe v. Wade*, 410 U.S. 113 (1973) for the proposition that the U.S. Constitution guarantees federal employees a right to physical privacy, which includes "a right to question and approve every substance that will be introduced into [their] bodies."[47] Assuming that this is correct, I find that he has not established that this right is absolute, and may not be balanced against the government's strong, competing interest in securing its military forces against attack; nor has he shown that this presumed, constitutional right outweighed the government's interests in this case.

Moreover, in addressing each of these defenses I am asked to inquire into the reasons for the agency's decision to vaccinate its CIVMARs. For example, to decide whether the constitutional right to equal protection was violated, I must determine whether there is a rational basis for the agency's decision to vaccinate some civilian employees but

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[44] H.T., testimony of Cook, Dickerson.

[45] IAF, Vol. 1, Tab 11, Appendix A, at 5, 9.

[46] *Id.*, Vol. 2, tab 20, at 10-11.

[47] *Id.*, at 12-13.

not others.[48] *See, e.g., U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175 (1980); *Romer v. Evans*, 517 U.S. 620, 631 (1996). As discussed above, I find that this decision is a military one, requiring unique expertise. By analogy to the Board's case law relating to security clearances, I find that the board may not address such arguments, even where they are framed in constitutional terms. *Cf. Mitchell v. Department of the Navy*, 43 M.S.P.R. 691, 694 (1990); *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988) (in an appeal under 5 U.S.C. § 7513 based on the denial or revocation of a security clearance, the Board does not have authority to review the substance of the underlying security clearance determination.)

Thus, I conclude that the appellant's constitutional defenses are outside the scope of Board's review; and in any event, if I were to reach them, they would not be sustained.

The appellant's claim of regulatory violation, and de facto defense of illegal discrimination on the basis of disability, are not sustained.

The appellant also alleges that "the agency failed to provide an accommodation under 5 C.F.R. § 339.204,"[49] which provides: "Agencies must waive a medical standard or physical requirement established under this part when

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[48] I note that this would not be difficult, in light of the fact that, unlike civilian employees in general, CIVMARs serve beside uniformed personnel, aboard Navy support vessels that accompany warships in high-risk areas, and they may come under attack by biological weapons. H.T., testimony of Cook.

[49] IAF, Vol. 5, Tab 15, at 3.

there is sufficient evidence that an applicant or employee, with or without reasonable accommodation, can perform the essential duties of the position, etc." *Id.*

I find that if this regulation is to apply, the appellant must show that he is a qualified person with disabilities, who is entitled to such accommodation under 29 C.F.R. § 1614.203. Thus, I treat this argument as a de facto defense of illegal discrimination on the basis of disability; i.e., a claim that the agency failed to reasonably accommodate his medical conditions of asbestosis and Agent Orange exposure, when it disciplined him for refusing the anthrax vaccine regardless of those conditions.

The elements of a prima facie case of disability discrimination generally include: A showing that the appellant is a disabled person and the action appealed was based on his disability; and, to the extent possible, an articulation of a reasonable accommodation under which the appellant believes that he could perform the essential duties of his position or of a vacant position to which he could be reassigned. *See Spencer v. Department of the Navy*, 73 M.S.P.R. 15, 24-25 (1997).

Here, I find that the medical evidence fails to establish that the appellant suffers from a disability that would entitle him to accommodation. Neither his doctor's report,[50] his own testimony, nor that of the Force Medical Officer[51] establish that his claimed asbestosis and Agent Orange exposure substantially limited his work in general,

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[50] Agency File, Subtab 4f.

[51] H.T., appellant, Rowe.

or any other major life activity. 29 C.F.R. §§ 1614.203(a)(1), (a)(3); *Clark*, 74 M.S.P.R. at 559. Accordingly, I sustain neither the claimed violation of 5 C.F.R. § 339.204, nor his de facto defense of disability discrimination.

The agency has established that its decision to impose removal was within tolerable limits of reasonableness under the circumstances of this case.

With regard to penalty, the agency must first show that "nexus" exists; i.e., that there is a clear and direct relationship between the sustained charges and either the employee's ability to accomplish his or her duties satisfactorily, or some other legitimate government interest. *See Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified, Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987). There is no doubt that an employee's deliberate refusal to follow supervisory instructions constitutes serious misconduct that warrants discipline. *Redfearn v. Department of Labor*, 58 M.S.P.R. 307, 316 (1993). Accordingly, I find that the agency has established a nexus between the appellant's misconduct and the efficiency of the service, by preponderant evidence.

The Board will review an agency-imposed penalty only to determine whether the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas*, 5 M.S.P.R. at 306. Where, as here, all of the agency's charges are sustained, the agency's penalty determination is entitled to deference and may be reduced only to the extent that it exceeds the maximum reasonable penalty

under the circumstances. *LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed.Cir.1999).

Record evidence establishes that deciding official Gregg Countryman considered potentially mitigating factors, including the appellant's relatively long service, lack of prior discipline, good work performance, his asserted lack of information while aboard ship, and his claimed medical conditions. Preponderant evidence also shows, and I find, that a medical exemption was considered and rejected on reasonable grounds before the removal was carried out.[52]

The deciding official also considered aggravating factors including, first and foremost, the nature and seriousness of the appellant's misconduct. Mr. Countryman testified that not only did the appellant refuse to accept the vaccine as charged, he indicated during the reply process that he would continue to do so in the future.[53] The appellant confirmed this at hearing, testifying that it was not for lack of medical guidance that he refused the vaccine: Rather, he had decided not to take it in any event, and still would not do so as of the date of hearing.[54] Mr. Countryman testified further that he considered reassigning the appellant, but all CIVMAR positions require anthrax vaccination; moreover, the appellant is in the excepted service, whereas all of the agency's

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[52] *Id.*, testimony of Countryman, Rowe; Agency File, Tabs 4b through 4h.

[53] H.T., testimony of Countryman.

[54] *Id.*, testimony of appellant on examination by administrative judge.

non-CIVMAR positions are in the competitive service, thus precluding a non-competitive reassignment.[55]

Mr. Countryman also testified that if he were to suspend the appellant and send him back to sea, this would simply invite repetition of the same problem the next time the ship entered a high-risk area. For this reason, Mr. Countryman testified, out of twenty-nine similar cases that he has decided, all who continued to refuse vaccination were either removed or resigned. Only where the employee subsequently agreed to take the vaccine was the penalty mitigated, from removal to a fourteen-day suspension. He testified further that had the appellant agreed to take the vaccine, he would have done the same thing in this case.[56]

Based on the foregoing, I conclude that Mr. Countryman considered the relevant factors and exercised his discretion within tolerable limits of reasonableness. *Douglas*, 5 M.S.P.R. at 306. Under the circumstances, I cannot find that his choice of penalty was so excessive as to be an abuse of discretion, or that it exceeds the maximum reasonable penalty under the circumstances. *Cf. Bolineau*, 57 M.S.P.R. at 247-48; *Johnson, et al. v. Department of Health & Human Services*, MSPB Docket Number DE-0752-99-0219-I-1 (August 23, 2000) (removal affirmed where the agency showed that no lesser action would satisfy a legal mandate.) Thus, I affirm the agency's action. *LaChance*, 178 F.3d at 1260.

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[55] *Id.*, testimony of Countryman.

[56] *Id.*

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/s/ Philip D. Reed
Philip D. Reed
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on **October 6, 2000**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are

important because if you wish to file a petition, you must file it within the proper time period.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

MICHAEL R. TESTMAN,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
SF-0752-00-0451-I-1

DATE: September 5, 2000

Tim S. McClain, Esquire, Principi & McClain, La Jolla, California, for the appellant.

Sandra Patterson-Jackson, Esquire, Virginia Beach, Virginia, for the agency.

BEFORE
Philip D. Reed
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed the agency's action that removed him from the excepted service position of Ordinary Seaman. He is a preference-eligible who occupied the same or similar position for more than one year,[1] and is therefore an "employee" as defined in 5 U.S.C. § 7511(a)(1)(B). The Board has jurisdiction under 5 U.S.C.

[1] Initial Appeal File (IAF), Vol. 1, Tab 1; *id.*, Tab 5 ("Agency File"), Subtabs 1, 4a; Official Hearing Tapes (H.T.), testimony of appellant.

§§ 7513(d) and 7701(a). A hearing was held on August 17, 2000.

For the reasons explained below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

At the time of his removal the appellant had been employed by the agency's Military Sealift Command (MSC) for approximately two and one half years with no prior discipline and a record of satisfactory or better performance. He also served for just over ten years as a uniformed member of the United States Navy, for a total of approximately twelve and one-half years of combined federal service.[2]

On December 20, 1999, the agency proposed his removal on a single charge of "failure to obey a direct order to receive mandatory injections of an anthrax immunization vaccine," supported by two specifications: (1) "On 16 November 1999, while aboard USNS KILAUEA (TAE 26), you were scheduled to receive an injection of the anthrax vaccine. you refused to be vaccinated with the anthrax vaccine"; and (2) "Captain J.A. Cook, Master, USNS KILAUEA (TAE 26), gave you a direct order to be vaccinated, and advised you that failure to obey the order was a serious offense and would result in the initiation of removal procedures. You again refused."[3]

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[2] H.T., testimony of appellant; IAF, Vol. 1, Tab 1, blocks 21, 22.

[3] Agency File, Subtab 4m.

In reply to the proposed removal, the appellant acknowledged that he had been ordered to report for the vaccination in question, and refused to do so. He contended, however, that he should not be disciplined because the vaccination program was illegal as applied to himself, and also violated his constitutional right to equal protection under the law.[4] In addition, he requested waiver of the vaccination requirement on medical grounds, and accommodation of an alleged medical condition consisting of an adverse reaction to prior vaccinations against anthrax.[5] Having considered these arguments, the agency carried out his removal effective April 15, 2000.[6]

On appeal, the appellant continues to maintain that the vaccination order was illegal, and his refusal to obey that order was obtained by "duress." He also raises affirmative defenses including alleged violations of his procedural and constitutional rights, and a de facto claim of illegal discrimination on the basis of disability.[7]

The agency has proven its charge of failure to obey a direct order by preponderant evidence.

The agency bears the burden of proving its charge by preponderant evidence. 5 C.F.R. § 1201.56(a). Here, I find that "failure to obey a direct order" is tantamount to a charge of insubordination, which has been defined as "a willful and intentional refusal . . . to obey an authorized

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[4] *Id.*, Subtab 4j.

[5] *Id.*, Subtabs 4d through 4g.

[6] *Id.*, Subtabs 4a, 4b.

[7] IAF, Vol. 2, Tab 15.

order of a superior officer which the officer is entitled to have obeyed." *Phillips v. General Services Administration*, 878 F.2d 370, 373 (Fed. Cir. 1989) (Emphasis omitted.) Thus, the agency must prove intent in order to support its charge. *Id.*

The KILAUEA is an ammunition ship, operated by MSC and manned by both civilian mariners (CIVMARs) and military personnel.[8] At the time in question it was providing direct support for warships of the Navy's 7th Fleet, operating in the western Pacific Ocean. Its primary mission was to carry munitions for use aboard the aircraft carrier USS KITTY HAWK.[9] In approximately October 1999 the KILAUEA was ordered to proceed to a port in Korea to undergo a major overhaul. Insofar as Korea was considered a high-risk area for biological weapons, including anthrax, the Commander of MSC directed that all members of the crew be vaccinated against anthrax.[10]

According to the both the appellant and another CIVMAR, Able Seaman Joseph Mazares,[11] the following

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[8] The ship's medical officer estimated that at the time in question the crew of the KILAUEA numbered approximately 100 persons, approximately 80% of whom were civilians and 20% were uniformed service members. H.T., testimony of Jensen.

[9] *Id.*, testimony of Cook.

[10] *Id.*

[11] Mr. Mazares also refused the vaccine, and was removed from his position on that basis. For purposes of administrative economy his Board appeal, Docket No. SF-0752-00-0445-I-1, was heard concurrently with this one. IAF, Vol. 1, Tab 3; Vol. 2, Tab 15; H.T., opening remarks of administrative judge. To save unnecessary duplication, I ordered each party to consolidate its exhibits for both appeals in filings to be placed only in the Mazares initial appeal file, Docket No. SF-0752-00-

(Continued on following page)

events ensued. On November 8, 1999, they and the rest of the Deck Department were told by the ship's First Officer or "Chief Mate," Edward Dickerson, to go to the office of the ship's Medical Service Officer (MSO), Thomas Jensen, and receive the vaccine, Mr. Mazares for the first time and the appellant for the third. Mr. Mazares testified further that Chief Mate Dickerson said they were to go in "groups of three," if they had "questions, ask the MSO," and if they "refused" then "discipline" would ensue. Mr. Mazares also testified that he went to see MSO Jensen as ordered, but told him that he was "not going to take the shot." The appellant testified that he told Chief Mate Dickerson, "I don't want to take the shot," and never went to see the MSO.[12]

Both testified further that the next day, Chief Mate Dickerson summoned them to a meeting with himself and the Master of the vessel, Captain Jeffrey Cook, in Captain Cook's office. At that time, Captain Cook told them that the matter was "out of [his] hands, [he] was merely the messenger," and had been "ordered to issue [them] an order" to take the vaccine, and "those who refuse will be charged with violating an order." Captain Cook also told them that they would "meet here again in one week," and "if [they] refuse[d]" at that point, he would "have no choice. I have my orders too," he reportedly stated.[13]

0445-I-1 ("MAF"). *See* IAF, Vol. 2, Tab 15, at 1. Accordingly, the records of the two appeals are hereby consolidated.

[12] *Id.*, testimony of appellant, Mazares.

[13] *Id.*, testimony of Mazares.

For the next week Chief Mate Dickerson repeatedly urged both sailors, in a good-natured but "emphatic" manner, to take the vaccine. At the end of the week he approached them and one other civilian who had also refused and said, grinning, "You guys aren't going to take the shot, are you?" All three stated that they would not. Chief Mate Dickerson then told them that he was "sorry," but he had orders from Captain Cook to "sign [them] off" the ship. He thanked them for their good work, and said that both he and the Captain "hoped to sail with [them] again," adding, "[Captain Cook] thinks this is a bunch of B.S."[14]

Chief Mate Dickerson and Captain Cook confirmed this account in all important respects.[15] I therefore find that the agency has shown by preponderant evidence that the appellant was directed by Chief Mate Dickerson, and then by Captain Cook, to go to the MSO's office and be vaccinated for anthrax, and in each instance he intentionally refused to do so. I therefore conclude that on each occasion the appellant willfully and intentionally refused the order of a superior officer. *See Phillips*, 878 F.2d at 373.

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[14] *Id.*, testimony of appellant, Mazares.

[15] *Id.*, testimony of Dickerson, Cook. Both recalled that the meeting in the Captain's office took place at the end of the one-week grace period, rather than the beginning. *Id.* This is contrary to a contemporaneous e-mail message from Captain Cook, which supports the chronology given by the appellant and Mr. Mazares. MAF, Vol. 2, Tab 22, Exhibit 1, at 3-4. In any event, I find that the precise dates and order of events are immaterial, insofar as the events themselves are admitted. *See Aiu v. Department of Justice*, 70 M.S.P.R. 509, 519, *aff'd*, 98 F.3d 1359 (Fed.Cir.1996) (Table) (agency need only prove the essence of its charge, not every factual specification).

It remains to be seen, however, whether the vaccination order was "authorized." *Id.* The appellant maintains that it was not because, with one exception not applicable here,[16] MSC allegedly lacked authority to order its civilian mariners to take the anthrax vaccine. To put it another way, he maintains that his insubordination resulted from an unlawful order, and was therefore procured by "duress."[17] *See, e.g., Gomez v. Department of Agriculture*, 63 M.S.P.R. 36, 38-39 (1994).

As a preliminary matter, I find that the board lacks authority to review the underlying reasons for the vaccination order, or rule on its merits. Captain Cook testified without contradiction that at the time in question, Korea had been designated a high-threat area for biological weapons, and in the expectation that KILAUEA would soon land there, he was ordered by the Commander of MSC to immunize his crew against anthrax.[18] Record evidence establishes that the Commander of MSC derives authority to make such an order from the Secretary of the Navy and the Chief of Naval Operations,[19] and the designation of high-threat areas is a matter reserved for Chairman of the Joint Chiefs of Staff, which is the highest

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[16] Under applicable regulations the agency was authorized to vaccinate civilians who, unlike the appellant, had been designated "emergency essential" personnel. *See* MAF, Vol. 3, Tab 27, at 15: *id.*, Vol. 2, Tab 20, at 8.

[17] *Id.*, Tabs 16, 20.

[18] H.T., testimony of Cook.

[19] MAF, Vol. 2, Tab 22, Enclosure 4.

level of military command short of the President.[20] Accordingly, I find that the decision to require anthrax vaccination bore directly on military operations, required special expertise, and is not subject to Board review. *See Jacobs v. Department of the Army*, 62 M.S.P.R. 688, 692-93 (1994); *Mindes v. Seaman*, 453 F.3d 197, 199-201 (5th Cir. 1971).

Nonetheless, in a case such as this, the Board may inquire into whether the military requirement in question was, in fact, made a requirement of the position encumbered by the appellant. *Archer v. Department of the Army*, 44 M.S.P.R. 427, 430 (1990); *Boulineau v. Department of the Army*, 57 M.S.P.R. 244, 248 n.6 (1993). For reasons that follow I find that it was, and that the authority to order such vaccinations was clearly delineated in the applicable regulations.

Under 5 C.F.R. § 339.205, agencies are authorized to establish "immunization programs by written policies or directives to safeguard the health of employees whose work may subject them or others to significant health or safety risks due to occupational or environmental exposure or demands." *Id.* The Department of Defense (DoD) has issued a written policy which provides for immunization against biological weapons whenever DoD personnel are expected to enter a "high threat area," defined as a "geographic area in the proximity of a nation or nations considered to pose a potential biological threat to DoD personnel by the Chairman of the Joint Chiefs of Staff in consultation with the Commanders of the Unified

[20] *Id.*, Vol. 1, Tab 11, Appendix D; *id.*, at subsection E2.1.3.

Commands and the Director, DIA."[21] The military departments, including the Department of the Navy, have jointly issued an instruction that implements this policy, and specifically authorizes immunization against biological threats for all "alert forces," including "all Navy and Military Sealift Command Ships (including civilian mariners). . . . "[22] The Department of the Navy also issued a further instruction specific to anthrax, that authorizes mandatory vaccination of "Federal civilian employees and other groups having status equivalent to deployable forces serving under the auspices of the [Department of the Navy]," and further provides: " . . . [I]n certain instances, anthrax immunization might be determined by the appropriate authority to be a condition of [civilian] employment."[23] This, in turn, was implemented within MSC by an order transmitted on October 14, 1999, stating that "[t]he basic immunization series for deployable Naval Forces, including anthrax, is a requirement for all MSC CIVMARs unless medically waived"; and that immunization was to begin immediately for "personnel subject to deployment into high threat areas for any length of time."[24] Thus, I find that the agency had full authority to order the appellant to submit to anthrax vaccination, and immediate vaccination became a requirement of the appellant's CIVMAR position when KILAUEA was ordered to land in Korea, which had been designated a high-threat area. *See Archer*, 44 M.S.P.R. at 430.

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[21] *Id.*

[22] *Id.*, Appendix A, at 5, 9.

[23] *Id.*, Appendix B, at G-1.

[24] *Id.*, Appendix F, at 3.

The appellant also maintains that when he refused the order, he was concerned for his health based on unpleasant side effects he had experienced when he took the vaccine previously; and he had not received "any information, training or briefing on the safety of the drug. . . ."[25] I find, however, that such information was available from Chief Mate Dickerson and the MSO;[26] when the appellant was first directed to take the vaccine, he was told to "ask the MSO" if he had questions about it;[27] yet the appellant never did so, despite having an additional week to consider the matter.[28] Under the circumstances, I find that his subjective fear of vaccination was not sufficient to excuse his failure to obey a direct order. *See Gomez*, 63 M.S.P.R. at 38-39, *citing Haymore v. Department of the Navy*, 9 M.S.P.R. 499, 504-505 (1982).

For all of the above reasons I conclude that the vaccination orders were lawful, and the agency had a right to have them obeyed, Thus, the charge of failure to obey a direct order is sustained as to both specifications. *Phillips*, 878 F.2d at 373.

The appellant's defense of harmful procedural error is not sustained.

The appellant also contends that the agency committed harmful procedural error in the application of "DOD

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[25] *Id.*, Vol. 2, Tab 20, at 5.

[26] H.T., testimony of Dickerson, Jensen; MAF, Vol. 2, Tab 22, Exhibit 2.

[27] H.T., testimony of Mazares.

[28] *Id.*, testimony of appellant.

directives and SECNAV instructions" pertinent to the vaccination program, and in failing to adhere to "FDA certification regulations."[29]

Harmful error cannot be presumed: The burden is on the appellant to show that the agency committed an error in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See* 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3); *Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 685 (1991).

Claimed Lack of Information; Failure to Designate as EEP

The appellant contends that he "did not receive information on the anthrax vaccine or the AVIP program as required by" DOD and agency directives.[30] Assuming that such a requirement exists, I find that it was not violated in this case, because the appellant was told how to obtain such information and failed to do so. He also argues that the agency erred in failing to designate him as "Emergency Essential Personnel" (EEP), because the only civilians who may properly be vaccinated for anthrax are EEP.[31] It is undisputed that MSC has not designated its

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[29] MAF, Vol. 2, Tabs 16, 18, 20.

[30] *Id.*, Tab 16.

[31] Under DoD regulations issued in 1991, EEP are defined as civilian employees who are "located overseas or . . . would be transferred overseas during a crisis situation or . . . [are required] to deploy or to perform temporary duty assignments overseas during a crisis in

(Continued on following page)

CIVMARs as EEP,[32] and a DoD memorandum dated March 30, 1999, directed immediate anthrax vaccination for "all U.S. military personnel and Department of Defense (DoD) emergency essential civilian employees and contractor personnel" assigned to high-threat areas, including the Korean Peninsula.[33] However, it does not follow that among civilian employees only EEP may be vaccinated, and others may not, even though they are deployed to high-threat areas. The memorandum in question says no such thing, nor does it invalidate the DoD instructions cited above. that specifically authorize anthrax vaccination of CIVMARs.[34] I therefore find that the appellant has not shown error in this regard.

Medical Waiver

The appellant also contends that he "was entitled to a medical exemption from the [vaccination] program" because he suffered adverse reactions to two previous vaccinations against anthrax, and the agency erred in failing to grant one.[35]

The appellant first received the anthrax vaccine earlier in 1999 when the KILAUEA was deployed to

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support of a military operation." DoD Directive 1404.10, Enclosure 2, section E2.1.5., at MAF, Vol. 3, Tab 27, Appendix O.

[32] *Id.*, Vol. 1, Tab 11, at 12.

[33] Agency File, Subtab 4j, Exhibit F.

[34] MAF, Vol. 1, Tab 11, Appendix A, at 5, 9.

[35] Agency File, Subtab 4j, Exhibit F. *Also see, e.g.*,, MAF, Vol. 1, Tab 11, Appendix A, at 4 (typical waiver provision).

another high-threat area, in the Middle East.[36] He testified that a few days after the first injection he began to experience severe headaches, joint pain, and swelling of the hands and feet. At that time, he testified, he told MSO Jensen that he was "experiencing pain," and Mr. Jensen said only, "Don't worry," and advised him to "drink plenty of water." Two weeks later he received a second vaccination and experienced similar symptoms; whereupon MSO Jensen told him that the "only thing he [Mr. Jensen] could do was put it in [the appellant's] medical record." Throughout these events the appellant continued to do his work without interruption.[37]

Later that year, when the vaccination order in question was issued, the appellant did not formally request a waiver. He simply refused the order and returned to the United States to face the consequences. His waiver request was not made until after the agency had proposed his removal, and indeed, after it had issued the first of two decisions removing him from the position. When the request was made, the agency rescinded its decision letter and invited the appellant to provide medical evidence to substantiate his request.[38] Two weeks later he submitted a summary evaluation from an emergency room physician who apparently saw him just once, after the decision was issued. The report recounted his earlier reactions to the vaccine, which the doctor had not observed, and based

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[36] H.T., testimony of appellant. Mr. Mazares did not join the ship until September 1999, and thereby avoided this earlier round of vaccinations. *Id.* testimony of Mazares.

[37] H.T., testimony of appellant.

[38] *Id.*; Agency File, Subtabs 4b, 4h, 4i.

solely on his self-report recommended that a wavier be granted.[39] Force Medical Officer Captain John Rowe, M.D., reviewed the appellant's on-board medical file and found no record of the claimed reaction. On this evidence, Dr. Rowe found it "difficult" to confirm or assess the severity of the alleged symptoms, and therefore advised Mr. Countryman that the appellant had not shown that he was eligible for a waiver.[40]

The appellant maintains that MSO Jensen erred by failing to record his earlier reaction to the vaccine in his medical record, and based on that reaction, he should have been granted a temporary waiver of the vaccination requirement pending further medical assessment ashore.[41] Both MSO Jensen and Dr. Rowe testified that had they known of this claim at the time of the vaccination order in question, they would have granted the appellant a temporary exemption and removed him from the ship for further evaluation.[42]

The fact remains that when the appellant was again ordered to take the vaccine he neither requested a waiver, nor did he even report to the MSO as he had been directed to do. Moreover, he eventually had an opportunity to establish eligibility for a permanent waiver, prior to his

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[39] *Id.*, Subtab 4f.

[40] H.T., testimony of Rowe; Agency File, Subtabs 4c through 4h. Although the appellant's emergency room physician was approved to testify as a witness, he failed to appear at hearing without good cause; thus, he was not heard. H.T. remarks of administrative judge prior to closing arguments.

[41] *Id.*, testimony of appellant.

[42] *Id.*, testimony of Jensen, Rowe.

removal. Dr. Rowe testified that his chance of doing so would have been better had the MSO recorded his earlier reports of headaches, etc.[43] Still, based on Dr. Rowe's testimony at hearing, I am not convinced that this alone would have changed the outcome. The medical evaluation that the appellant gave Dr. Rowe was quite sketchy, and seemed to have been obtained only as an afterthought, in an effort to forestall the agency's first removal decision. It is also undisputed that the appellant's claimed symptoms were not so severe that they prevented him from working, and it is unclear whether they were anything out of the ordinary: MSO Jensen testified without contradiction that "flue symptoms" are not unusual after taking the vaccine.[44]

Assuming that some degree of error occurred with respect to recording and acting upon the appellant's earlier symptoms, I find that he has not shown that this likely affected the outcome of his case before the agency. He has not shown that it caused the offense itself, since no waiver was requested until months after he refused the vaccine; nor has he shown entitlement to a permanent waiver on objective, medical grounds. For these reasons, I conclude that he has not shown that the agency would likely have made a different decision concerning his removal, in the absence or cure of its presumed errors. *See* 5 U.S.C. § 7701(C)(2)(A); 5 C.F.R. § 1201.56(c)(3).

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[43] *Id.*, testimony of Rowe.

[44] *Id.*, testimony of appellant, Jensen.

FDA Certification

With regard to "FDA certification regulations," the appellant maintains that the anthrax "vaccine as formulated in November 1999 . . . is an 'experimental drug,' or was used for unapproved purposes," and the agency therefore erred in ordering him to take it without his "informed consent." In response, the agency asserts that the anthrax vaccine has been licensed since 1970.[45] The appellant agrees, but asserts that the "license applies only to the use for which the vaccine was licensed," which was to prevent anthrax contracted through skin exposure.[46] He then assumes, without evidentiary support, that the "biological warfare threat" in Korea involves exposure to anthrax by inhalation rather than skin contact; and asserts that since the vaccine has not been tested against the former, its use in this case was "experimental."[47]

Neither the appellant nor the Board is in a position to assess the exact nature of the threat in question. As stated above, this is a military question which is beyond our ken. *See Jacobs*, 62 M.S.P.R. at 692-93. I also am not convinced by his analysis that a military command may not, under appropriate circumstances, order a civilian employee to take an experimental vaccine in order to safeguard its military forces, as well as the employee's own life. Indeed, the Navy regulation concerning vaccination against

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[45] MAF, Vol. 1, Tab 11, "Motion to Limit Issues, etc.," at 5-6, *citing O'Neil v. Secretary of the Navy*, 76 F.Supp.2d 641, 645 (W.D.Pa.1999).

[46] MAF, Vol. 2, Tab 20, at 3.

[47] *Id.*, at 4.

biological weapons clearly contemplates such an occurrence.[48] Thus, the appellant has not shown that the use of the anthrax vaccine aboard USNS KILAUEA was unlicensed, or otherwise violated requirements for "FDA certification."

The appellant's constitutional defenses are outside the scope of Board review in this case, and in any event, they would not be sustained.

The appellant also maintains that his removal should be reversed because in carrying out the vaccination program, the agency violated his U.S. Constitutional rights to equal protection, due process and privacy.[49]

With respect to equal protection, he alleges that the agency "implemented the anthrax program in a discriminatory manner," in that it did not provide CIVMARs with the "protections" provided under DoD regulations, which allegedly prohibit anthrax vaccination of civilian employees except those designated as EEP; and because senior officers on the USNS KILAUEA were allegedly excused from the program because of their rank.[50] He has produced no evidence to support the latter assertion; indeed, the Master and Chief Mate both testified that they were vaccinated for anthrax.[51] With regard to the former, I have found above that the provision for vaccinating EEP was non-exclusive, and the applicable instructions specifically

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[48] *Id.*, Vol. 1, Tab 11, Appendix A, Section F, subparagraph 49.5.

[49] *Id.*, Vol. 2, Tab 18, at 4.

[50] *Id.*, Tab 20, at 6-7.

[51] H.T., testimony of Cook, Dickerson.

authorize MSC to vaccinate CIVMARs.[52] In a similar vein, the appellant argues that the agency's alleged violation of DoD vaccination procedures also constituted a denial of due process.[53] Again, I find that MSC had full authority to vaccinate CIVMARs, under DoD regulations and its own.

Finally, the appellant cites *Roe v. Wade*, 410 U.S. 113 (1973) for the proposition that the U.S. Constitution guarantees federal employees a right to physical privacy, which includes "a right to question and approve every substance that will be introduced into [their] bodies."[54] Assuming that this is correct, I find that he has not established that this right is absolute, and may not be balanced against the government's strong, competing interest in securing its military forces against attack; nor has he shown that this presumed, constitutional right outweighed the government's interests in this case.

Moreover, in addressing each of these defenses I am asked to inquire into the reasons for the agency's decision to vaccinate its CIVMARs. For example, to decide whether the constitutional right to equal protection was violated, I must determine whether there is a rational basis for the agency's decision to vaccinate some civilian employees but not others.[55] *See, e.g., U.S. Railroad Retirement Board v.*

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[52] MAF, Vol. 1, Tab 11, Appendix A, at 5, 9.

[53] *Id.*, Vol. 2, Tab 20, at 10-11.

[54] *Id.*, at 12-13.

[55] I note that this would not be difficult, in light of the fact that, unlike civilian employees in general, CIVMARs serve beside uniformed personnel, aboard Navy support vessels that accompany warships in high-risk areas, and they may come under attack by biological weapons. H.T., testimony of Cook.

Fritz, 449 U.S. 166, 175 (1980); *Romer v. Evans*, 517 U.S. 620, 613 (1996). As discussed above, I find that this decision is a military one, requiring unique expertise. By analogy to the Board's case law relating to security clearances, I find that the Board may not address such arguments, even where they are framed in constitutional terms. *Cf. Mitchell v. Department of the Navy*, 43 M.S.P.R. 691, 694 (1990); *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988) (in an appeal under 5 U.S.C. § 7513 based on the denial or revocation of a security clearance, the Board does not have authority to review the substance of the underlying security clearance determination.)

Thus, I conclude that the appellant's constitutional defenses are outside the scope of Board's review; and in any event, if I were to reach them, they would not be sustained.

The appellant's claim of regulatory violation, and de facto defense of illegal discrimination on the basis of disability, are not sustained.

The appellant also alleges that "the agency failed to provide an accommodation under 5 C.F.R. § 339.204,"[56] which provides: "Agencies must waive a medical standard or physical requirement established under this part when there is sufficient evidence that an applicant or employee, with or without reasonable accommodation, can perform the essential duties of the position, etc." *Id.*

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[56] MAF, Vol. 5, Tab 15, at 3.

I find that if this regulation is to apply, the appellant must show that he is a qualified person with disabilities, who is entitled to such accommodation under 29 C.F.R. § 1614.203. Thus, I treat this argument as a de facto defense of illegal discrimination on the basis of disability; i.e., a claim that the agency failed to reasonably accommodate his allegedly adverse reaction to the anthrax vaccine, when it disciplined him for refusing further vaccination.

The elements of a prima facie case of disability discrimination generally include: A showing that the appellant is a disabled person and the action appealed was based on his disability; and, to the extent possible, an articulation of a reasonable accommodation under which the appellant believes that he could perform the essential duties of his position or of a vacant position to which he could be reassigned. *See Spencer v. Department of the Navy*, 73 M.S.P.R. 15, 24-25 (1997).

Here, I find that the medical evidence fails to establish that the appellant suffers from a disability that would entitle him to accommodation. Neither his doctor's report,[57] his own testimony, nor that of the Force Medical Officer[58] establish that his claimed reaction to the vaccine substantially limited his work in general, or any other major life activity. 29 C.F.R. §§ 1614.203(a)(1), (a)(3); *Clark*, 74 M.S.P.R. at 559. The fact that his reaction arguably makes it unable for him to work aboard ships in high-risk areas does not establish that he is disabled,

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[57] Agency File, Subtab 4f.

[58] H.T., appellant, Rowe.

because it does not foreclose generally the type of employment involved. *See Groshans v. Department of the Navy*, 67 M.S.P.R. 629, 635-37 (1995). Accordingly, I sustain neither the claimed violation of 5 C.F.R. § 339.204, nor his de facto defense of disability discrimination.

The agency has established that its decision to impose removal was within tolerable limits of reasonableness under the circumstances of this case.

With regard to penalty, the agency must first show that "nexus" exists; i.e., that there is a clear and direct relationship between the sustained charges and either the employee's ability to accomplish his or her duties satisfactorily, or some other legitimate government interest. *See Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *modified Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987). There is no doubt that an employee's deliberate refusal to follow supervisory instructions constitutes serious misconduct that warrants discipline. *Redfearn v. Department of Labor*, 58 M.S.P.R. 307, 316 (1993). Accordingly, I find that the agency has established a nexus between the appellant's misconduct and the efficiency of the service, by preponderant evidence.

The Board will review an agency-imposed penalty only to determine whether the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas*, 5 M.S.P.R. at 306. Where, as here, all of the agency's charges are sustained, the agency's penalty determination is entitled to deference and may be reduced only to the extent that it exceeds the maximum reasonable penalty

under the circumstances. *LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed.Cir.1999).

Record evidence establishes that deciding official Gregg Countryman considered potentially mitigating factors, including the appellant's relatively long service, lack of prior discipline, good work performance, his asserted lack of information while aboard ship, and his claimed reaction to the vaccine. Preponderant evidence also shows, and I find, that a medical exemption was considered and rejected on reasonable grounds before the removal was carried out.[59]

The deciding official also considered aggravating factors including, first and foremost, the nature and seriousness of the appellant's misconduct. Mr. Countryman testified that not only did the appellant refuse to accept the vaccine as charged, he indicated during the reply process that he would continue to do so in the future.[60] The appellant confirmed this at hearing, testifying that it was not for lack of medical guidance that he refused the vaccine: Rather, he had decided not to take it in any event, and still would not do so as of the date of hearing.[61] Mr. Countryman testified further that he considered reassigning the appellant, but all CIVMAR positions require anthrax vaccination; moreover, the appellant is in

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[59] *Id.*, testimony of Countryman, Rowe; Agency File, Tabs 4b through 4h.

[60] H.T., testimony of Countryman.

[61] *Id.*, testimony of appellant on examination by administrative judge.

the excepted service, whereas all of the agency's non-CIVMAR positions are in the competitive service, thus precluding a non-competitive reassignment.[62]

Mr. Countryman also testified that if he were to suspend the appellant and send him back to sea, this would simply invite repetition of the same problem the next time the ship entered a high-risk area. For this reason, Mr. Countryman testified, out of twenty-nine similar cases that he has decided, all who continued to refuse vaccination were either removed or resigned. Only where the employee subsequently agreed to take the vaccine was the penalty mitigated, from removal to a fourteen-day suspension. He testified further that had the appellant agreed to take the vaccine, he would have done the same thing in this case.[63]

Based on the foregoing, I conclude that Mr. Countryman considered the relevant factors and exercised his discretion within tolerable limits of reasonableness. *Douglas*, 5 M.S.P.R. at 306. Under the circumstances, I cannot find that his choice of penalty was so excessive as to be an abuse of discretion, or that it exceeds the maximum reasonable penalty under the circumstances. *Cf. Bolineau*, 57 M.S.P.R. at 247-48; *Johnson, et al. v. Department of Health & Human Services*, MSPB Docket No. DE-0752-99-0219-I-1 (August 23, 2000) (removal affirmed where the agency showed that no lesser action would satisfy a legal mandate.) Thus, I affirm the agency's action. *LaChance*, 178 F.3d at 1260.

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[62] *Id.*, testimony of Countryman.

[63] *Id.*

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Philip D. Reed
Philip D. Reed
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.112(a)(5).

Department of Defense

DIRECTIVE

NUMBER 6205.3

November 26, 1993

ASD (NS&CP)

SUBJECT: DoD Immunization Program for Biological Warfare Defense

References: (a) Title 10, United States Code

(b) DoD Instruction 6205.2, "Immunization Requirements," October 9, 1986

(c) AR 40-562/NAVMEDCOMINST 6230.3/AFR 161-13/CG COMDTINST M6230.4D, "Immunizations and Chemoprophylaxis," November 7, 1988

(d) DoD Directive 5136.1, "Assistant Secretary of Defense for Health Affairs," December 2, 1992

(e) through (g), see enclosure 1

1. PURPOSE

This Directive:

1.1. Establishes policy, assigns responsibilities, and prescribes procedures for members of the Department of Defense against validated biological warfare threats, and prioritization of research, development, testing, acquisition, and stockpiling of biological defense vaccines under reference (a).

1.2. Provides vaccination guidance that focuses exclusively on defense against biological warfare threats and complements immunization requirements for naturally occurring endemic disease threats outlined in references (b) and (c).

1.3. Addresses peacetime and contingency requirements for immunization against biological warfare threats against U.S. personnel.

1.4. Designates the Secretary of the Army as the "DoD Executive Agent" for the DoD Immunization Program for Biological Warfare Defense.

1.5. Provides direction on levels of acquisition and stockpiling of biological defense vaccines and prioritizes research and development efforts in defending against current and emerging biological warfare threats.

2. APPLICABILITY AND SCOPE

This Directive applies to:

2.1. The Office of the Secretary of Defense, the Military Departments (including their National Guards), the Chairman of the Joint Chiefs of Staff, the Unified Commands, and the Defense Agencies (hereafter referred to collectively as "the DoD Components"). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

2.2. Essential DoD civilian personnel, and personnel of other Federal Departments, when assigned as part of the U.S. Armed Forces.

3. DEFINITIONS

Terms used in this Directive are defined in enclosure 2.

4. POLICY

It is DoD policy that:

4.1. For immunization, the following personnel, subject to special exceptions approved by the Chairman of the Joint Chiefs of Staff, should be immunized against validated biological warfare threat agents, for which suitable vaccines are available, in sufficient time to develop immunity before deployment to high-threat areas:

4.1.1. Personnel assigned to high-threat areas.

4.1.2. Personnel predesignated for immediate contingency deployment (crisis response).

4.1.3. Personnel identified and scheduled for deployment on an imminent or ongoing contingency operation to a high-threat area.

4.2. For vaccine research, development, testing, evaluation, acquisition, and stockpiling, efforts for the improvement of existing vaccines and the development of new vaccines against all validated biological warfare threat agents shall be integrated and prioritized. The Department of Defense shall develop a capability to acquire and stockpile adequate quantities of vaccines to protect the programmed force against all validated biological warfare threats.

5. RESPONSIBILITIES

5.1. The Under Secretary of Defense for Acquisition and Technology shall ensure the coordination and integration of the DoD Immunization Program for Biological Warfare Defense with all acquisition-related elements of the DoD Biological Defense Program.

5.2. The Under Secretary of Defense for Policy shall review all facets of the DoD Immunization Program for Biological Warfare Defense to ensure that it is consistent with DoD policy and is adequately integrated into overall DoD biological defense policies.

5.3. The Assistant Secretary of Defense for Health Affairs shall:

5.3.1. Serve as the advisor to the Secretary of Defense as in DoD Directive 5136.1 (reference (d)) on the DoD Immunization Program for Biological Warfare Defense.

5.3.2. In consultation with the DoD Executive Agent, the Secretaries of the Military Departments, and the Chair of the Armed Forces Epidemiological Board, identify vaccines available to protect against biological threat agents designated by the Chairman of the Joint Chiefs of Staff and recommend appropriate immunization protocols.

5.3.3. Issue instructions to the Military Departments and the other appropriate DoD Components on the immunization of DoD personnel, under the guidelines of this Directive, and monitor and evaluate the implementation of those instructions.

5.4. The Secretary of the Army, as the DoD Executive Agent for the Immunization Program for Biological Warfare Defense, shall:

5.4.1. Besides those responsibilities in the Deputy Secretary of Defense Memorandum and the Joint Service Agreement (references (e) and (f)), do the following to enhance the DoD Immunization Program for Biological Warfare Defense, and report annually through the Assistant Secretary of Defense for Health Affairs (ASD (HA)) to the Secretary of Defense the capability to carry out those policies:

5.4.1.1. Vaccine Research and Development

5.4.1.1.1. Priorities developed in coordination with the ASD (HA), the Chairman of the Joint Chiefs of Staff, and the Secretaries of the Military Departments shall include the development of vaccines against validated biological warfare threat agents for which none exist, improvement of vaccines that are unacceptable in the time they take to produce immunity or in the level of immunity they produce or are inadequate because of the number of doses required to achieve immunity, assessment of the effectiveness of vaccines against biological warfare threat agents in their likely modes of use (e.g., aerosols), and development of multivalent vaccines that will produce protective immunity after a single vaccination.

Vaccines must be either licensed by the Food and Drug Administration (FDA) or have been designated, under FDA requirements, "for use as investigational new drugs (INDs)," as in 21 CFR 50 (reference (g)).

5.4.1.2. Vaccine Acquisition and Stockpiling

5.4.1.2.1. Develop and maintain a DoD capability to acquire and stockpile adequate quantities of vaccines to protect the programmed force against all validated biological warfare threat agents for which suitable vaccines exist.

5.4.1.2.1. On an annual basis, provide information and recommendations, in coordination with the Secretaries of the Military Departments and the Chair of the Armed Forces Epidemiological Board, to the ASD (HA) on vaccines to acquire and appropriate immunization schedules that include reimmunization required to develop and maintain protective immunity. Those recommendations should include, but not be limited to the following:

5.4.1.2.1.1. All relevant data on the effectiveness of each vaccine against the corresponding biological warfare threat agent.

5.4.1.2.1.2. The expected type, frequency, and severity of vaccine-associated adverse reactions.

5.4.2. Serve as the focal point for the submission of information from the Services, as specified by subsection 5.5., below, and monitor the Services' implementation of the DoD Immunization Program for Biological Warfare Defense. Recommend appropriate changes and improvements to the Secretary of Defense through the ASD (HA), and the Secretaries of the Military Departments. Report to the Secretary of Defense annually on the Immunization Program for Biological Warfare Defense.

5.4.3. The Executive Agent Acquisition Executive (AE) shall plan, program, and budget for biological defense.

The AE shall coordinate directly with the ASD (HA), the Under Secretary of Defense for Policy, the Under Secretary of Defense for Acquisition, the Secretaries of the Departments, and other offices as required to ensure program integration.

5.5. The Secretaries of the Military Departments shall:

5.5.1. Implement, monitor, evaluate, and document the DoD Immunization Program for Biological Warfare Defense in their Department and establish procedures for coordinating and reporting the following information to the Executive Agent:

5.5.1.1. The identification, reporting, and epidemiologic evaluation of vaccine-associated adverse reactions, in accordance with FDA requirements.

5.5.1.2. The collection and forwarding of data required by the Executive Agent needed to meet the requirements of the FDA for products that are the INDs.

5.5.2. Transmit the instructions of the ASD (HA) about the immunization program for biological warfare defense to subordinate units.

5.5.3. Program and budget for the required vaccinations for members of their Department and provide the DoD Executive Agent with projected program requirements.

5.6. The Chairman of the Joint Chiefs of Staff, in consultation with the Commanders of the Unified Commands; the Chiefs of the Military Services; and the Director, Defense Intelligence Agency (DIA), annually and as required, shall validate and prioritize the biological warfare threats to DoD personnel and forward that list to the DoD Executive Agent through the ASD (HA).

5.7. The Commanders of the Unified Commands, annually and as required, shall provide the Chairman of the Joint Chiefs of Staff with their assessment of the biological warfare threats to their theaters.

5.8. The Chair of the Armed Forces Epidemiological Board, in consultation with the DoD Executive Agent and

the Secretaries of the Military Departments, annually and as required, shall identify to the ASD (HA) vaccines available to protect against validated biological warfare threat agents, and recommend appropriate immunization protocols.

6. PROCEDURES

The DoD Immunization Program for Biological Warfare Defense shall be conducted, as follows:

6.1. The Commanders of the Unified Commands, annually and as required, shall provide the Chairman of the Joint Chiefs of Staff with their assessment of the biological warfare threats to their theater.

6.2. The Chairman of the Joint Chiefs of Staff, in consultation with the Commanders of the Unified Commands; the Chiefs of the Military Services; and the Director, DIA, annually, shall validate and prioritize the biological warfare threats to DoD personnel and forward them to the DoD Executive Agent through the ASD (HA).

6.3. Within 30 days of receiving the validated and prioritized biological warfare threat list from the Chairman of the Joint Chiefs of Staff, the DoD Executive Agent shall, in consultation with the Secretaries of the Military Departments and the Chair of the Armed Forces Epidemiology Board, provide recommendations to the ASD (HA) on vaccines and immunization protocols necessary to enhance protection against validated biological warfare threat agents.

6.4. Within 30 days of receiving the coordinated recommendations of the DoD Executive Agent, the ASD (HA) shall direct the Secretaries of the Military Departments to

begin immunization of the specified DoD personnel against specific biological warfare threat agents.

6.5. For biological threats for which the only available vaccine is an ND, it shall be administered under 21 CFR 50 and 312 (reference (g)) and the established ND protocol and/or other applicable legal procedures.

7. INFORMATION REQUIREMENTS

The annual reporting requirements in section 5., above, have been assigned Report Control Symbol DD-POL(A) 1921.

8. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. The Secretaries of the Military Departments shall forward one copy of implementing documents to the Assistant Secretary of Defense for Health Affairs within 120 days.

Enclosures – 2

1. References

* * *

(SEAL) THE ASSISTANT SECRETARY OF DEFENSE

HEALTH AFFAIRS WASHINGTON, DC 20301-1200

MAY 18 1998

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS CHAIRMAN OF THE JOINT CHIEFS OF STAFF UNDER SECRETARIES OF DEFENSE ASSISTANT SECRETARIES OF DEFENSE GENEREAL COUNSEL, DEPARTMENT OF DEFENSE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

SUBJECT: Implementation of the Anthrax Vaccination Program for the Total Force

I have approved implementation of the Anthrax Vaccination Program for the total force. As you know, on December 15, 1997, I approved the program after a two-year review effort and based on the recommendation of the Chairman and Joint Chiefs of Staff. I made implementation of the program contingent on the successful completion of four conditions: supplemental testing of the vaccine; assured tracking of immunizations; approved operational and communications plans; and review of the health and medical aspects of the program by an independent expert. All conditions for implementing the anthrax vaccination program for the total force have now been met. Vaccinations of the active components and Selected Reserve shall proceed consistent with this memorandum and all specifications of the Food and Drug Administration approved product labeling.

The Secretary of the Army, in accordance with DoD Directive 6205.3, "DoD Immunization Program for Biological Warfare Defense" (November 26, 1993) will exercise

Executive Agency for the Department's Anthrax Vaccination Program. The Secretary of the Army will assign a senior military official to implement vaccine acquisition and stockpiling and, on behalf of the Executive Agent, will perform the following functions: manage and administer the overall program; serve as focal point for the submission of information from the Services relating to vaccine adverse reactions and vaccine projected program requirements; monitor the Services' implementation of the Anthrax Vaccination Program; and execute the Army's implementation plan.

The Assistant Secretary of Defense for Legislative Affairs is directed to carry out the congressional notification plan. The Assistant Secretary of Defense for Public Affairs is directed to carry out the public communication plan and insure the consistency of informational materials for military members. The Assistant Secretary of Defense for Health Affairs is responsible for the promulgation of medical standards, policies and protocols for the program.

The Secretaries of the Navy and Air Force are directed to assign a senior military official to implement respective Service implementation plans and to advise the Under Secretary of Defense (Personnel and Readiness) and the Executive Agent of this designation within seven days of the date of this memorandum. The Secretaries are further directed to implement, monitor, evaluate, and document the Anthrax Vaccination Program in their respective departments, conform to standards established on medical protocols and informational materials, advise the Executive Agent of any special, operationally necessary implementation requirements of their respective Services, and establish procedures for coordinating and reporting

required information to the Executive Agent. The Executive Agent will report quarterly to the Under Secretary of Defense (Personnel and Readiness) on the progress of the program.

(SEAL) THE ASSISTANT SECRETARY OF DEFENSE

HEALTH AFFAIRS WASHINGTON, DC 20301-1200

MAR 30 1999

MEMORANDUM FOR SECRETARY OF THE ARMY
SECRETARY OF THE NAVY
SECRETARY OF THE AIR FORCE

SUBJECT: Change to Anthrax Vaccine Immunization Program (AVIP) Operational Procedure (One Day Policy) Schedule

Effective immediately, the AVIP will be applied to all U.S. military personnel and Department of Defense (DoD) emergency essential civilian employees and contractor personnel assigned, deployed or on temporary duty in the high threat areas and contiguous waters of South-west Asia (Kuwait, Saudi Arabia, Bahrain, Jordan, Qatar, Oman, UAE, Yemen, and Israel) and the Korean Peninsula for any period of time. Prior to entry into the designated high threat areas these personnel must initiate vaccination against anthrax in accordance with the prescribed Immunization schedule. Ideally, personnel should receive at least the first three vaccinations in the series. In those rare circumstances when an Individual is not able to take or continue with the anthrax vaccination for medical or administrative reasons, they will be evaluated for deployability in accordance with Service criteria. Neither this policy nor the requirement to participate in AVIP is applicable to civilian employees or contractor personnel who are not designated as emergency essential.

Services will emphasize this policy immediately in all appropriate communications. Programs to educate and

inform personnel about the threat and the anthrax vaccine, prior to being immunized will continue as directed. Services will ensure that your activities meet labor relations obligations and contracting requirements prior to implementing this policy with respect to civilian employees and contractor personnel. The Military Health System shall support provision of anthrax immunizations.

Our continued success in executing the AVIP depends greatly upon meticulous execution of communication and compliance programs.

/s/ [Illegible]

FW R 141700Z-OCT-99 C ANTHRAX VACCINATION IMMUNI MSGID/GENADMIN//COMSC WASHINGTON DC//

SUBJ/ANTHRAX VACCINATION IMMUNIZATION PROGRAM (AVIP)//

REF/A/RMG/SECDEF/151342ZDEC97/-//

REF/B/DOC/DOD DIR/26NOV93/-//

REF/C/RMG/SECDEF/031403ZMAR98/-//

REF/D/DOC/SECNAVINST/6230.4/-//

REF/E/SECDEF/29190-4ZMAY98/-//

REF/F/USD (P&R) MEMO DTD 30 MAR 99/-//

REF/G/RMG/BUMED/281500ZSEP98/-//

REF/H/RMG/BUMED/151500ZOCT98/-//

REF/I/RMG/SECNAV/271840ZAPR98/-//

REF/J/DOC/BUMEDINST/6230.15/-//

REF/K/DOC/BUMEDNOTE/6230/-//

REF/L/DOC/5CFR339.205/-//

RMKS/1. THE PURPOSE OF THIS MSG IS TO DELINEATE THE MSC IMMUNIZATION (INCLUDING ANTHRAX) POLICY FOR CIVILIAN MARINERS (CIVMARS). PER REFS A THRU E, THE THREAT OF BIOLOGICAL WARFARE IS A CONSTANT RISK AGAINST U.S. FORCES. ASSESSMENTS HAVE IDENTIFIED ANTHRAX AS THE PRIMARY BIOLOGICAL THREAT FACING AMERICAN SERVICE PERSONNEL. THE ANTHRAX VACCINE HAS BEEN GIVEN IN THE

U.S. FOR ALMOST 30 YEARS TO CIVILIAN HIGH-RISK PERSONNEL SUCH AS VETERINARIANS, LIVESTOCK WORKERS AND SPECIAL OPERATIONS MILPERS WITH NO SERIOUS SIDE EFFECTS. ANTHRAX VACCINE IS CONSIDERED ONE OF THE SAFEST VACCINES AVAILABLE.

2. IN DEC 97, SECDEF APPROVED TOTAL FORCE ANTHRAX IMMUNIZATION PROGRAM AS AN INTEGRAL PART OF DOD FORCE PROTECTION WITH VACCINATION INITIATED IN THE SUMMER OF 1998.

3. REFS (D) AND (E), UPDATED BY REF (F), PROMULGATED ACCELERATED ANTHRAX IMMUNIZATION PRGM DESIGNED TO IMMUNIZE PERSONNEL DEPLOYING TO SOUTHWEST ASIA (SWA) AND NORTHEAST ASIA (NEA) REGIONS PRIOR TO COMMENCING TOTAL FORCE IMMUNIZATION PLANS.

FW R 141700Z-OCT-99 C ANTHRAX VACCINATION IMMUNI

4. REFS (D) AND (G) OUTLINE A SYSTEMATIC, THREE PHASED, TOTAL FORCE IMPLEMENTATION PLAN DEVELOPED TO VACCINATE THE ENTIRE FORCE AGAINST ANTHRAX OVER A 6 TO 7 YEAR PERIOD. REFS (G) AND (H) OUTLINE SPECIFIC DATES, CONTACTS, AND LOGISTICS. THE DOD AVIP TOTAL FORCE VACCINATION PROGRAM WILL BE EXECUTED IN THREE PHASES AS FOLLOWS: PHASE I. FROM INCEPTION TO THE END OF CY 1999, PHASE I, REQUIRES THAT PERSONNEL SUBJECT TO DEPLOYMENT INTO HIGH THREAT AREAS FOR ANY LENGTH OF TIME, BE IMMUNIZED FOR ANTHRAX. IDEALLY, AT LEAST THREE SHOTS SHOULD BE GIVEN, IF FEASIBLE, PRIOR TO DEPLOYMENT.

PHASE II. DEPENDENT ON VACCINE PRODUCTION, PHASE II WILL COMMENCE JAN 2000 AND VACCINE GIVEN TO PERS OF SPECIFIED UNITS THAT ARE IDENTIFIED IN ADVANCE OR SUBJECT TO DEPLOYMENT WITHIN C+35 DAYS OR EARLIER IN SUPPORT OF OPLANS INTO HIGH THREAT AREAS. PHASE III. PHASE III IS SKED TO COMMENCE 2003 AND WILL IMMUNIZE THE REMAINDER OF THE TOTAL FORCE AND NEW ACCESSIONS. ONCE THE AVIP BASIC SERIES OF SHOTS IS COMPLETED, PERSONNEL WILL RECEIVE AN ANNUAL BOOSTER TO MAINTAIN IMMUNITY. ANTHRAX VACCINE WILL BE A ROUTINE VACCINATION REQUIREMENT.

5. MSC'S POLICY IS TO FULLY SUPPORT AND IMPLEMENT DOD AND SUBSEQUENT SUPPORTING DIRECTIVES PURSUANT TO FULL FORCE IMMUNIZATION OF PERS AGAINST ANTHRAX.

6. IAW REFS (I) THROUGH (L), ALL NAVY AND MILITARY SEALIFT COMMAND SHIPS, INCLUDING CIVMARS ARE SUBJECT TO THE SAME IMMUNIZATION REQ AS DEPLOYABLE FORCES. BASED ON SPECIFIC DISEASE RISK ASSESSMENTS IN THEIR AREA OF OPERATIONS (AOR), THE CINCS OF UNIFIED COMMANDS MAY REQUIRE ADDITIONAL IMMUNIZATION(S) TO PROTECT PERSONNEL TRAVELING INTO THAT AOR AGAINST OTHER IDENTIFIED DISEASE(S). THE BASIC IMMUNIZATION SERIES FOR DEPLOYABLE NAVAL FORCES, INCLUDING ANTHRAX, IS A REQUIREMENT FOR ALL MSC CIVMARS UNLESS MEDICALLY WAIVED.

7. REFERENCE (D) ESTABLISHED WAIVER CRITERIA FOR AVIP, AND REF (F) ESTABLISHED GENERAL

WAIVER POLICY FOR ALL IMMUNIZATIONS. REFUSAL TO RECEIVE ANTHRAX OR OTHER REQUIRED IMMUNIZATIONS WITHOUT AN APMC APPROVED WAIVER ON MEDICAL OR OTHER GROUNDS AS SET FORTH BY DOD OR DON WILL BE SUBJECT TO ADMINISTRATIVE AND/OR DISCIPLINARY ACTION HANDLED BY THE APMC. THE ISSUE IS REFUSAL OF A DIRECT ORDER AND IS NOT AN ISSUE OF ANTHRAX VACCINE SAFETY. THE ANTHRAX VACCINE WAS NOT TESTED BY THE FDA FOR SIDE EFFECTS ON PERSONNEL BELOW 17 YEARS OF AGE OR ABOVE 65 YEARS OF AGE. THEREFORE, PERS 66 YEARS OF AGE OR OLDER, CAN NOT BE LEGALLY IMMUNIZED FOR ANTHRAX AND ARE AUTOMATICALLY WAIVED. MSC PERS IN THIS CATEGORY MAY BE REASSIGNED TO ANOTHER UNIT NOT DEPLOYING TO A HIGH THREAT AREA OR SIGN A WAIVER IF THEY WISH TO DEPLOY TO A HIGH THREAT AREA WITHOUT THE ANTHRAX IMMUNIZATION.

8. POINT OF CONTACT FOR THE MSC AVIP AND POLICY IS MR. JIM GEE AT COMSC WASHINGTON DC (202) 685-5134. RESOLUTION OF POTENTIAL DISCIPLINARY ISSUES INVOLVING REQUIREMENTS OF EMPLOYMENT ARE TO BE ADDRESSED AT THE APMC.

AIR FORCE JOINT INSTRUCTION 48-110
ARMY REGULATION 40-562
BUMEDINST 6230.15
CG COMDTINST M6230.4E
1 NOVEMBER 1995

BY ORDER OF THE
SECRETARIES OF THE AIR FORCE,
ARMY, NAVY, AND TRANSPORTATION

(SEAL) *Aerospace Medicine*

IMMUNIZATIONS AND CHEMOPROPHYLAXIS

This publication provides the directive requirements for the Armed Forces Immunizations Program, establishes general principles, procedures, policies, and responsibilities for the immunizations program, implements Department of Defense (DoD) Instruction 6205.2, *Immunization Requirements*; DoD Directive 6205.3, *DoD Immunization Program for Biological Warfare Defense*; International Military Standardization Agreement (STANAG 3474); and international health regulations and requirements. This publication applies to uniformed departments of the Air Force, Army, Navy, Marine Corps, and Coast Guard (Active and Reserve), nonmilitary persons under military jurisdiction, selected Federal employees, and family members eligible for care within the military health care system. Each form affected by the Privacy Act which is required by this publication either contains a Privacy Act Statement incorporated in the body of the document or is covered by the DD Form 2005, **Privacy Act Statement – Health Care Records**. Send comments and suggested improvements on AF Form 847, **Recommendation for Change of Publication**, through channels, to HQ AFMOA/SGOP, 110 Luke Avenue, Room 400, Bolling AFB,

DC 20332-7050 or to preventive medicine authorities assigned in 12.4.3.

SUMMARY OF REVISIONS

This revision updates recent changes in immunization recommendations by the U.S. Public Health Service and incorporates requirements of the National Childhood Vaccine Injury Act of 1986 (Section 2126 of the Public Health Service Act, 42 U.S.C. 300aa-26).

Section A – Responsibilities

1. Command Medical Authority. Prescribes specific immunization and chemoprophylactic requirements for their units per requirements established by this publication and additional guidance provided by the appropriate Surgeon General (SG) or Commandant (G-K), Coast Guard.

2. Commanders. Commanders, commanding officers, and officers-in-charge:

2.1. Ensure all military and nonmilitary personnel under their jurisdiction receive all required immunizations.

2.2. Maintain appropriate international, Federal, state, and local records of all required immunizations (Section G).

2.3. Ensure personnel transferred to another command receive appropriate immunizations for the area which assigned.

3. Commanders At Ports of Embarkation or Debarkation. Ensure deviations from specified immunizations and reimmunizations are cleared or authorized by the appropriate SG or Commandant (G-K), Coast Guard.

4. Medical Treatment Facility Commanders, Commanding Officers, and Command Surgeons.

4.1. Ensure currently published standards for both adult and pediatric immunizations, and chemoprophylactic practices are followed and references in attachment 1 are carefully reviewed.

* * *

Table 1. Vaccinations for Military Personnel.

Immunizing Agent	Army	Navy	Air Force	Marine Corps	Coast Guard
Adenovirus types 4 and 7	B	B	G	B	G
Cholera	E	E	E	E	E
Hepatitis A	G	G	C,D	G	G
Hepatitis B	F,G	F,G	F,G	F,G	F,G
Influenza	A,B,X	A,B,R	A,B,R	A,B,R	B,C,G
JE Vaccine	D	D	D	D	G
Measles	B,F	B,F	B,F	B,F	B,G
Meningococcal (A, C, Y, W135)	B,D	B,D	B,D	B,D	B,G
Mumps	F,G	B,F,G	F,G	B,F,G	G
OPV	B,D,R	B,R	B,R	B,R	A
Plague	D,F	F	F	F	F
Rabies	F	F	F	F	G
Rubella	B,F	B,F	B,F	B,F	B
Tetanus-diphtheria	A,B,R	A,B,R	A,B,R	A,B,R	A,B
Typhoid	C,D	C,D	C,D	C,D	D
Varicella	F,G	F,G	F,G	G	F,G
Yellow fever	C,D	A,R	C,D	A,R	B,C,E

A--All active duty personnel
B--Recruits
C--Alert Forces
D--When deploying or traveling to high risk areas
E--Only when required by host country for entry
F--High Risk Occupational Groups
G--As directed by applicable surgeon general or Commandant (G-K), Coast Guard
R--Reserve Components
X--Reserve Component personnel on active duty for 30 days or more during the influenza season

(Officer accessions are addressed in text)

* * *

Section C – Personnel Subject to Immunizations

14. Active Duty Personnel. Receive immunizations as indicated in Table 1.

15. Accessions and Recruits. Officer and enlisted accessions are scheduled at a minimum for influenza during influenza season, trivalent Oral Polio Vaccine (OPV), measles, tetanus-diphtheria, and rubella vaccination early during processing or training. Recruits also receive adenovirus types 4 and 7 and meningococcal vaccination.

15.1. Air Force Only. Air Force recruits receive adenovirus vaccination only when there is evidence of active disease transmission.

15.2. Navy and Marine Corps Only. Officer and enlisted accessions receive mumps vaccine and influenza vaccine year-round.

16. ROTC and Service Academies. Members of the Army, Navy, Air Force, and Marine Corps Components, to include Reserve Officers' Training Corps (ROTC) cadets, who are ordered or called to active duty or active duty for training in the U.S. for a period of 30 days or less (and not in recruit training) and officers in Service Academies are immunized in accordance with the requirements for officer accessions. Adenovirus and meningococcal vaccinations are not required for ROTC and Service Academy attendance. Army ROTC cadets attending summer camps in the U.S. receive tetanus-diphtheria, measles, and rubella vaccines only. Oral polio vaccine is not required for Army cadets in summer camps.

17. Alert Forces. Alert forces are defined as follows and are immunized in accordance with Table 1. Categories are as follows:

17.1. Army Only. Members of units, both active and Reserve Component, designated to be in a state of readiness for immediate deployment to any area outside of the U.S., includes units and individuals required to be in a state of readiness for immediate deployment within 30 days or less of notification.

17.2. Navy and Marine Corps Only. All fleet units deployed on a scheduled or situational basis to any foreign country (except Canada). These units include all Navy and Military Sealift Command ships (including civilian mariners), aircraft squadrons, Fleet Marine Force units, construction battalion detachments, and naval special warfare personnel. This includes Medical Department personnel assigned to Mobile Medical Augmentation Readiness Teams and other naval personnel, including members of Reserve units, subject to foreign deployment on short notice.

17.3. Air Force Only. Aircrew personnel, individuals, and members of units (active, Reserve Component, and Air National Guard) subject to rapid deployment to any theater of operations by virtue of present assignment or mission function.

17.4. Coast Guard Only. Personnel attached to combat or combat support units (WHEC, WMEC, WPB, WAGB, WLB, CGAS), national strike force, members of the Coast Guard Reserve designated by the district commander, individuals or special teams which are available for immediate deployment outside the United States, and any

or all members of a unit whose commanding officer chooses to protect and preserve operational effectiveness.

18. Reserve Component Personnel. Other than as defined above, military personnel, including individuals in the Reserve Components, receiving orders for active duty for periods of 30 days or more (10 days for Naval Reservists) are immunized in accordance with Table 1. Immunizations and re-immunizations are given as soon as possible after receipt of orders or after arrival at a training or mobilization center, or in the case of persons not so assigned, at the first and subsequent duty stations.

19. Family Members. Family members should receive immunizations following current ACIP recommendations.

20. Federal Civilian Employees Subject to Rapid Deployment. Federal civilian employees and other groups having status equivalent to deployable forces serving under the auspices of the Military Services are subject to the same immunization requirements as active duty personnel.

21. Other Federal Civilian Employees and Their Family Members.

21.1. Employees and their family members engaged in foreign duty under military sponsorship. Federal civilian employees and their family members receive immunizations required for entry by the foreign country in which they are working. Country specific immunizations are administered at military installations without charge upon presentation of official orders or authorization. Area preventive medicine authorities are consulted for recommendations for specific areas. Persons declining immunizations required for entry into foreign countries are

counseled that this omission may subject them to compulsory immunizations, detention and quarantine, or denial of entry by host country authorities.

21.2. Occupationally indicated vaccines for civilian employees. Federal civilian employees at risk of exposure to an infectious disease associated with their occupation or service receive appropriate immunizations without charge at military activities. Immunizations will be administered upon recommendation of the responsible preventive medicine authority.

* * *

ANNEX G

CIVILIAN PERSONNEL

1. REFERENCES

a. Department of Defense Directive, DoDD 6205.3, DoD Immunization Program for Biological Warfare Defense, 26 November 1993 (NOTAL).

b. BUMEDINST 6230.15, Air Force Joint Instruction 48-110, Army Regulation 40-562, and CG COMDTINST M6230.4E, Immunizations and Chemoprophylaxis (NOTAL).

c. Package Insert, Anthrax Vaccine Absorbed, Michigan Biological Products Institute

2. PURPOSE. To provide the civilian personnel concept of operations and assign responsibility for the implementation of the Department of the Navy Anthrax Vaccination Implementation Program (AVIP).

3. Scope. This Annex applies to all civilian employees of the DON.

4. APPLICABILITY

a. Overall policy. Federal civilian employees and other groups having status equivalent to deployable forces serving under the auspices of the DON are subject to the same immunization requirements as active duty personnel. Commanding officers must comply with 5 Code of Federal Regulations (CFR) 339.205 prior to requiring immunization of federal civilian employees. Questions regarding the application of this policy to contract employees will be addressed by the cognizant contracting activity.

b. Immunization against anthrax is indicated for those employees (DON civilians) whose duties classify them "Mission Essential" and place them at risk for exposure to anthrax used as a biological weapon in a combat or operational setting.

c. For the purposes of this plan, risk does not include the potential for anthrax used in acts of terrorism against noncombatants. Examples of employees who should be immunized include those who work in, or are likely to be deployed to, areas of operations identified as high risk.

d. Ultimately, the commander determines which employees are at sufficient risk to warrant immunization.

e. Command-directed anthrax immunization is administered without charge to the employee.

4. CONSENT FOR IMMUNIZATION

a. Civilian employee immunization is by informed consent. Employees will be encouraged to accept anthrax immunization when offered. However, in certain instances, anthrax immunization might be determined by the appropriate authority to be a condition of employment. A Vaccine Information Sheet will be provided to all vaccine recipients.

b. The effect on an employee who refuses immunization, when indicated, will be determined by the supervisor and commander in conjunction with representatives of the Civilian Personnel Office. Refusal of anthrax immunization must be documented in the employee personnel record and the occupational health record.

5. DOCUMENTATION

a. *Risk communication*. Commanders will be responsible for ensuring that employees are adequately trained and aware of the health risk of anthrax as a biological weapon, and document that this training was received.

b. *Refusal*. Refusal of immunization must be documented as indicated in 4b above.

c. *Health records*

(1) All anthrax immunizations will be recorded in the occupational health record and on a PHS Form 731. Written entries will contain the data elements described in annex A.

(2) Employee immunizations will be entered into the automated data system for tracking in the manner described in annex C.

(3) Serious adverse reactions to immunization will be recorded in the occupational health record, and reported to NAVENVIRHLTHCEN in the manner described in annex C.

Supreme Court, U.S.
FILED
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No. 02-846

In the Supreme Court of the United States

JOSEPH V. MAZARES, JR., AND MICHAEL R. TESTMAN,
PETITIONERS

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the Navy's decision to remove petitioners for refusing to obey an order to receive a mandatory vaccination.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Case:

Brehmer v. *FAA*, 294 F.3d 1344 (Fed. Cir. 2002) 8

Statute and regulation:

10 U.S.C. 5013(b) 5
5 C.F.R. 339.205 6

Miscellaneous:

Bureau of Medicine & Surgery, Dep't of the Navy, *Immunization Requirements and Recommendations* (Apr. 20, 1998) 6
Policy on Administrative Issues Related to the Anthrax Vaccine Immunization Program (Aug. 6, 2002) (<http://www.anthrax.mil/media/pdf/AdminiIssues.pdf>) 10
Reintroduction of the Anthrax Vaccine Immunization Program (June 28, 2002) (<http://www.anthrax.mil/media/pdf/resumptionpolicy.pdf>) 9
Secretaries of the Air Force, Army, Navy, and Transportation, *Immunizations and Chemoprophylaxis, BUMEDINST 6230.15* (Nov. 1, 1995) 2, 6, 8, 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 302 F.3d 1382. The opinions (Pet. App. 16-61) and orders (Pet. App. 10-15) of the Merit Systems Protection Board are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2002. The petition for a writ of certiorari was filed on December 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Military Sealift Command (MSC) of the Department of the Navy (Navy) is responsible for

transporting the equipment, fuel, supplies, and ammunition that sustains U.S. armed forces worldwide during peacetime and war. Unlike other Navy ships, the MSC's vessels are manned by civilian mariners (CIVMARs) and civilian contractor mariners. But at the same time, MSC vessels operated by CIVMARS are under Navy administrative and operational control and operate alongside, and in direct support of, active duty Navy combat vessels around the world.

2. In 1993, the Department of Defense issued Directive 6205.3, establishing a general immunization program for biological warfare defense. Pet. App. 62-70. The directive provided that "[p]ersonnel assigned to high-threat areas" should be "immunized against validated biological warfare threat agents[] for which suitable vaccines are available." *Id.* at 64. In 1995, the military departments issued a joint instruction, Secretaries of the Air Force, Army, Navy, and Transportation, *Immunizations and Chemoprophylaxis* (Nov. 1, 1995) (*BUMEDINST 6230.15*), implementing Directive 6205.3. Pet. App. 80-87. Among other things, the joint instruction specified that "all Navy and Military Sealift Command ships (*including civilian mariners*)" are subject to immunization. *Id.* at 85 (emphasis added). The joint instruction further authorized the commanders-in-chiefs of unified commands to "establish specific immunization requirements" with respect to particular missions. *BUMEDINST 6230.15*, § 26.2.

In 1998, the Secretary of Defense approved an anthrax vaccine immunization program (AVIP). Pet. App. 71. The Secretary of the Navy has issued instructions implementing AVIP, which provide, *inter alia*, that "[f]ederal civilian employees and other groups having status equivalent to deployable forces serving under the auspices of the [Navy] are subject to the

same immunization requirements as active duty personnel." *Id.* at 88. The instructions apply AVIP to civilian employees "whose duties classify them [as] 'Mission Essential' and place them at risk for exposure to anthrax used as a biological weapon in a combat or operational setting." *Id.* at 89. The instructions further provide that civilians "who work in, or are likely to be deployed to, areas of operations identified as high risk" are subject to immunization, and that commanders are responsible for determining "which employees are at sufficient risk to warrant immunization." *Ibid.*

In October 1999, acting pursuant to the Secretary of the Navy's instructions, the Commander of the MSC issued an order providing that "[t]he basic immunization series for deployable naval forces, including anthrax, is a requirement for all MSC CIVMARs unless medically waived." Pet. App. 78.

3. In October 1999, petitioners served as CIVMARs aboard the naval ship KILAUEA, which at the time was deployed with the U.S. Pacific Seventh Fleet to provide munitions support to the aircraft carrier USS KITTY HAWK. The KILAUEA was ordered to undergo a major overhaul in South Korea. Korea has been determined by the military to be a high-risk area for biological weapons. As a result, the KILAUEA's captain, acting pursuant to the Commander of the MSC's October 1999 order, ordered anthrax immunizations for the crew, which consisted of CIVMARs. Petitioners refused the direct orders of the chiefmate and the captain to receive the anthrax vaccination, and were returned to California. Pet. App. 2-3.

In December 1999, the Navy instituted removal proceedings against petitioners for failure to obey a direct order to receive the anthrax vaccination. Petitioners claimed that their refusal to obey the vaccination order

was justified by medical reasons. The Navy cancelled the removals and investigated their claims. But after investigating the claims and conducting full administrative proceedings, the Navy concluded that neither petitioner was entitled to a medical exemption and removed both for failure to obey the vaccination order. Pet. App. 3.

4. Petitioners appealed to the Merit Systems Protection Board (MSPB). After a hearing, an administrative judge affirmed the Navy's decision of removal in both cases See Pet. App. 16-37, 38-61. The administrative judge concluded that the Commander of the MSC is authorized to implement the Navy's directives governing vaccinations and to order CIVMARs to be vaccinated against anthrax upon entering a designated high-threat area, and that the KILAUEA's captain was therefore authorized to order petitioners to receive the anthrax vaccination before their deployment to South Korea. *Id.* at 21-22, 44-45. The full MSPB denied petitioners' requests for review. *Id.* at 10-11, 13-14.

5. The court of appeals affirmed. Pet. App. 1-9. The court rejected petitioners' argument, based on a March 30, 1999, memorandum issued by the Assistant Secretary of Defense for Health Affairs, that the order requiring petitioners to be vaccinated against anthrax was not authorized. The court recognized that the March 30, 1999, memorandum stated a "general policy" with respect to administering the anthrax vaccine to military and civilian personnel, and that the memorandum was not applicable to "non-'emergency essential' civilian employees," such as petitioners. *Id.* at 6. But the court concluded that the March 30, 1999, memorandum did not "either explicitly or by necessary implication, *prohibit* anthrax vaccination of such civilian

employees, *i.e.*, those who are not designated 'emergency essential.'" *Ibid.* (emphasis added).

The court further recognized that "[t]he military has broad authority and discretion in dealing with its personnel, both military and civilian, including the protection of their health." Pet. App. 7. In addition, the court continued, "[t]here is ample authority in the appropriate Navy regulations and directives for the Navy to require all civilian employees, including those not designated 'emergency essential,' to receive anthrax vaccine when the Navy determines that such action is necessary and appropriate to protect the health of such employees." *Id.* at 6. After reviewing those authorities (discussed above), the court held that "[t]he Navy did not exceed its authority or otherwise abuse its discretion by ordering [petitioners] to undergo anthrax vaccination" in light of the fact that they were deployed to a high-threat area for biological warfare. *Ibid.*

ARGUMENT

The court of appeals correctly concluded that the Navy had authority to remove petitioners when they refused to undergo vaccination for anthrax before their deployment to an area where the military has determined there to be a high threat for biological attack. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. The Secretary of the Navy is vested by statute with "the authority necessary to conduct[] all affairs of the Department of the Navy." 10 U.S.C. 5013(b). In conjunction with that general statutory authority, the Navy (along with other federal agencies) is specifically empowered by regulation to "establish periodic exami-

nation or immunization programs by written policies or directives to safeguard the health of employees whose work may subject them or others to significant health or safety risks due to occupational or environmental exposure or demands." 5 C.F.R. 339.205. That statutory and regulatory power gives the Navy ample authority to require CIVMARs deployed to areas in which there is a high threat of biological attack to undergo immunizations to protect them from biological threats that could harm or kill them and thus disrupt the military missions in which they are engaged.

In particular, *BUMEDINST 6230.15* has provided since 1995 that civilian employees "having status equivalent to deployable forces * * * are subject to the same immunization requirements as active duty personnel," and that CIVMARs serving on Navy and Military Sealift Command vessels deployed to any foreign country except Canada constitute part of the Navy's "alert forces" for immunization purposes. Pet. App. 85, 86.[1] The Secretary of the Navy's 1998 directive regarding anthrax immunization reiterates that civilian employees with a status equivalent to deployable forces are subject to the same immunization requirements as active duty personnel. *Id.* at 88. It

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[1] Petitioners assert (Pet. 10) that *BUMEDINST 6230.15* does not specifically include anthrax in its list of prescribed immunizations. But the scope of the directive was specifically modified in April 1998 to cover anthrax. See Bureau of Medicine & Surgery, Dep't of the Navy, *Immunization Requirements and Recommendations* § 6(a)(1) (Apr. 20, 1998). Moreover, as noted above, *BUMEDINST 6230.15* itself authorizes commanders-in-chief of unified commands to establish immunization requirements that are "at variance with normal service immunization policies for personnel entering their area of responsibility to participate in exercises or other operational missions." *Id.* § 26.2.

further provides that civilian employees "who work in, or are likely to be deployed to, areas of operation identified as high risk" should be immunized against anthrax, and that commanders may determine "which employees are at sufficient risk to warrant immunization." *Id.* at 89.[2]

At the time that petitioners were ordered to take the anthrax vaccination, their vessel was scheduled to be deployed to South Korea, which had been designated as a high-threat area for biological weapons. It is undisputed that active duty forces serving in the Korean theater of operations were subject to mandatory anthrax innoculation, and the 1995 and 1998 directives make clear that CIVMARs serving in high-threat areas are subject to the same immunization rules as active duty forces. The Commander of the MSC's October 1999 directive regarding anthrax immunization of CIVMARs and the individual immunization orders given to petitioners are based on and fully supported by those directives.

b. The Federal Circuit properly rejected the argument (Pet. 7-8) that the Navy was barred by a March 30, 1999, memorandum from requiring CIVMARs in high-threat areas to undergo anthrax vaccination. The memorandum was issued by the Assistant Secretary of Defense for Health Affairs to announce the adoption of

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[2] Petitioners argue (Pet. 14) that the Navy's 1998 directive authorizes anthrax immunization only for "those employees * * * whose duties classify them [as] 'Mission Essential.'" Pet. App. 89. But the directive is not confined to such employees and, indeed, expressly provides for immunization of all employees "who work in, or are likely to be deployed to, areas of operations identified as high risk." *Ibid.* So too, the 1998 direction vests commanders with the authority to determine which individual employees "are at sufficient risk" to warrant immunization. *Ibid.*

a policy requiring anthrax immunization for personnel serving in Southwest Asia and the Korean peninsula "for any period of time." Pet. App. 74. The memorandum states that "[n]either this policy nor the requirement to participate in AVIP is applicable to civilian employees or contractor personnel who are not designated as emergency essential." *Ibid.* But the memorandum in no way purports to prohibit commanders from requiring particular classes of civilian employees, such as CIVMARS, to undergo anthrax vaccination in response to specific operational requirements.

As the Federal Circuit recognized, the memorandum merely sets forth a general policy and leaves the military services discretion to depart from that policy if they determine that particular circumstances or missions require a different approach. Pet. App. 6; see *Brehmer* v. *FAA*, 294 F.3d 1344, 1348 (Fed. Cir. 2002) (a policy "indicates the standards an agency generally will follow in conducting its operations," but is not "a black letter rule that the agency is required to follow in all cases without regard to the circumstances of the particular situation before it").

Petitioners argue (Pet. 11-12) that while the policy announced in the memorandum may not have been binding on the Department of Defense, it nonetheless bound the Navy as a component of the Department. That is incorrect. As explained, at the time that the March 30, 1999, memorandum was issued, existing directives expressly permitted commanders to establish immunization requirements "at variance with normal service immunization policies for personnel entering their area of responsibility to participate in exercises or other operational missions." *BUMEDINST 6230.15*, § 26.2. Nothing in the March 30, 1999, memorandum suggests that it was intended to impose a categorical

rule that precluded military departments from using pre-existing immunization authority to deal with particularized operational needs, much less to divest commanders of settled authority to respond to high-risk threats of biological attack in areas such as Korea.

Petitioners' interpretation of the memorandum also leads to an absurd result. Under petitioners' reading, the Navy was *prohibited* from requiring vaccination for one group of employees (CIVMARs) entering a high-threat area, but was *required* to vaccinate another group of employees ("emergency essential" employees) who were entering the same high-threat area. The court of appeals and MSPB correctly reasoned instead that the Department of Defense's and Navy's policies and directives on mandatory immunizations left the Navy discretion to require anthrax immunization on a basis that met the Navy's operational requirements and that ensured equal treatment to employees facing the same biological threats.

2. The March 30, 1999, memorandum on which petitioners rely has been superseded by new directives regarding the scope of the anthrax vaccination program. The new directives underscore that CIVMARs are not exempt from compulsory anthrax vaccination, and further undercut any need for review in this case.

In June 2002, the Deputy Secretary of Defense issued a memorandum reintroducing the anthrax vaccination program and modifying the general contours of the program.[3] The June 2002 memorandum states that "[t]he scope of the AVIP shall encompass personnel assigned to or deployed for more than 15 days in higher

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[3] Deputy Secretary of Defense, *Reintroduction of the Anthrax Vaccine Immunization Program* (June 28, 2002) <http://www.anthrax.mil/media/pdf/resumptionpolicy.pdf>.

threat areas whose performance is essential for certain mission critical capabilities." The memorandum also directs the Under Secretary of Defense for Personnel and Readiness, who is senior to the Assistant Secretary of Defense for Health Affairs, to "issue policy guidance on the medical and administrative aspects of the AVIP."

In August 2002, acting pursuant to the Deputy Secretary's directive, the Under Secretary of Defense for Personnel and Readiness issued a memorandum providing guidance on the "applicability and scope" of the program.[4] The Under Secretary's memorandum provides, *inter alia*, that the current anthrax vaccination policy applies to "personnel categorized as alert forces, as defined in the joint regulation on Immunizations and Chemoprophylaxis" (*BUMEDINST 6230.15*). That directive, in turn, explicitly includes CIVMARs in its definition of "alert forces." Pet. App. 85. Accordingly, the Department's current anthrax vaccination directives subject CIVMARs to mandatory vaccination on the same terms as other military personnel serving in high-threat areas.

The Federal Circuit properly upheld the Navy's decision to remove petitioners. But in any event, there is no reason for this Court to grant plenary review of the Federal Circuit's construction of a policy memorandum that is no longer in effect and that has no bearing on the Navy's current vaccination policy.

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[4] Under Secretary of Defense for Personnel and Readiness, *Policy on Administrative Issues Related to the Anthrax Vaccine Immunization Program* (Aug. 6, 2002) <http://www.anthrax.mil/media/pdf/AdminiIssues.pdf>.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MICHAEL R. TESTMAN,

Petitioners,

v.

DEPARTMENT OF THE NAVY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. The Navy Without Merit Asserts That It May Lawfully Order Civilian Mariners to Take the Anthrax Vaccine 1

II. The Navy's Reliance on the August 2002 DoD Memorandum Reintroducing the Anthrax Vaccination Program Evidences the Importance of Further Review by this Court 6

CONCLUSION 8

ARGUMENT

Respondent, Department of the Navy ("Navy"), advances two arguments in support of its position that further review is not warranted. Both of these arguments are without merit.

I. The Navy Without Merit Asserts That It May Lawfully Order Civilian Mariners to Take the Anthrax Vaccine

The Navy cites to three documents in support of its argument that it may lawfully order civilian mariners ("CIVMAR") to take the anthrax vaccine. Specifically, the Navy erroneously relies on: (1) a March 1999 Department of Defense Memorandum; (2) BUMEDINST 6230.15, a document promulgated by the Navy Surgeon General; and (3) SECNAVINST 6230.4, an instruction issued by the Secretary of the Navy. None of these documents, however, provides support for such authority.

A. March 1999 Department of Defense Memorandum

In March 1999, the Department of Defense ("DoD") issued a memorandum regarding the applicability of the anthrax vaccine to civilian employees:

> "Effectively immediately, the AVIP (Anthrax Vaccine Immunization Program) will be applied to all U.S. military personnel and Department of Defense (DoD) emergency essential civilian employees.... **Neither this policy nor the requirement to participate in AVIP is applicable to civilian employees or contractor**

> **personnel who are *not* designated as emergency essential."**

(App. 74-75) (emphasis added).

The Navy argues (Resp. 8) that this "memorandum in no way purports to prohibit commanders from requiring particular classes of civilian employees, such as CIVMARs, to undergo anthrax vaccination in response to specific operational requirements." The Navy further asserts (Resp. 9) that not allowing it to vaccinate CIVMARs with the anthrax vaccine would lead to an "absurd" result:

> "Under petitioners' reading, the Navy was *prohibited* from requiring vaccination for one group of employees (CIVMARs) entering a high-threat area, but was *required* to vaccinate another group of employees ("emergency essential" employees) who were entering the same high-threat area."

The Navy foolishly characterizes Mazares' and Testman's argument as "absurd" because it clearly does *not* understand the legal difference between a CIVMAR and a civilian employee designated as "emergency essential." Under DoD Directive 1404.10, an "emergency essential" civilian employee is defined as follows:

> "A civilian position located overseas or that would be transferred overseas during a crisis situation or which requires the incumbent to deploy or to perform temporary duty assignments overseas during a crisis in support of a military operation."

Additionally, under Directive 1404.10, an employee designated as "emergency essential" will receive a pay allowance, benefits and entitlements commensurate with the

level of physical harm or imminent danger being encountered. Finally, under Directive 1404.10, a civilian employee before being designated as "emergency essential" may ***refuse*** the designation and ***shall*** be reassigned expeditiously, without loss of grade or pay, to a "non-emergency essential" position.

Therefore, the intent of the March 1999 DoD Memorandum is very clear: the DoD authorized ***only*** civilians designated as "emergency essential" to be vaccinated with the anthrax vaccine because these civilian employees may refuse the designation (and thus not have to undergo the vaccination), or accept the designation and receive higher pay, benefits and entitlements commensurate with the level of physical harm or imminent danger being encountered.

Accordingly, the Navy is "*prohibited* from requiring vaccination for one group of employees (CIVMARs) entering a high-threat area" because these civilian employees have *not* agreed to accept the risks associated with the anthrax vaccination, nor have these civilian employees received higher pay, benefits and entitlements commensurate with the level of physical harm or imminent danger being encountered. Moreover, the Navy is *required* to vaccinate another group of civilian employees ("emergency essential") who were entering the same high-threat area as the CIVMARs because these civilian employees have received higher pay, benefits and entitlements commensurate with the level of physical harm or imminent danger being encountered.

B. BUMEDINST 6230.15

In 1995, the Navy Surgeon General promulgated BUMEDINST 6230.15 to establish general principles, procedures, policies, and responsibilities for the Navy's immunization programs (App. 80-87). BUMEDINST 6230.15 provides that CIVMARs are subject to the same immunization requirements as all "alert forces" (App. 85). The word "anthrax," however, does not appear anywhere in BUMEDINST 6230.15.

The Navy asserts (Resp. 6, footnote 1) that the scope of the directive was modified in April 1998 by the Navy Surgeon General to cover anthrax. **This is the first time that the Navy raises this argument.** Regardless, the March 1999 DoD Memorandum regarding the applicability of the anthrax vaccine to civilian employees was issued eleven months **after** the April 1998 modification. Therefore, the DoD's memorandum *supercedes* anything stated to the contrary in the April 1998 modification by the Navy Surgeon General.

C. SECNAVINST 6230.4

In April 1998, the Secretary of the Navy issued an instruction regarding vaccinations. The instruction states that "[f]ederal civilian employees and other groups having status equivalent to deployable forces . . . are subject to the same immunization requirements as active duty personnel" (App. 88). However, the same instruction states, "Immunization against anthrax is indicated for those employees (DON civilians) whose duties classify them *'Mission Essential'* and place them at risk for exposure to anthrax used as a biological weapon in a combat or

operational setting" (emphasis added) (App. 89). Finally, the instruction states the following:

> "For the purposes of this plan, risk does not include the potential for anthrax used in acts of terrorism against noncombatants. Examples of employees who should be immunized include those who work in, or are likely to be deployed to, areas of operations identified as high risk."

(App. 89).

Although Mazares and Testman have *never* been designated as "*Mission Essential*" employees and the Navy has *never* made a contrary assertion, the Navy still asserts (Resp. 7, footnote 2) that SECNAVINST 6230.4 applies to them. The Navy argues that the last part of the instruction indicates that "any" civilian employee working in a "high risk" area should be immunized. The Navy is clearly overreaching for this interpretation. The intent of the last part of the instruction is simply to give an example of a civilian employee who should be classified as "*Mission Essential.*"

Regardless of whose interpretation of SECNAVINST 6230.4 is more accurate, the March 1999 DoD Memorandum regarding the applicability of the anthrax vaccine to civilian employees was issued eleven months **after** SECNAVINST 6230.4. Therefore, the DoD's memorandum *supercedes* anything stated to the contrary by the Secretary of the Navy in SECNAVINST 6230.4.

II. The Navy's Reliance on the August 2002 DoD Memorandum Reintroducing the Anthrax Vaccination Program Evidences the Importance of Further Review by this Court

In 2000, after Mazares and Testman had already been terminated from civilian service, the Navy ceased requiring CIVMARs to take the anthrax vaccine. As set forth in the Navy's opposition (Resp. 9-10), the DoD in August 2002 issued a revised memorandum reintroducing the anthrax vaccination program (Supp. App. 1-9). The August 2002 memorandum *now* requires CIVMARs to take the anthrax vaccine (Supp. App. 2).[1] The Navy cites to the August 2002 DoD Memorandum *not* in support of its decision to terminate Mazares and Testman, but in support of its argument that "there is no reason for this Court to grant plenary review ... of a policy memorandum [March 1999] that is no longer in effect." **This is the first time that the Navy raises this argument.**

The Navy's argument is without merit for two reasons. First, the August 2002 DoD Memorandum clearly supports Mazares' and Testman's assertion that under the March 1999 DoD Memorandum (App. 74-75) the Navy did *not* have authority to order CIVMARs to take the anthrax vaccine. In the August 2002 Memorandum, the DoD, by adding two new groups of civilian employees including CIVMARs who may be required to take the anthrax

[1] The August 2002 DoD Memorandum requires the following civilian employees to take the anthrax vaccine (Supp. App. 2): civilian employees designated as "emergency essential"; certain contractor personnel; and, alert forces including CIVMARs. In contrast, the March 1999 DoD Memorandum ***only*** required civilian employees designated as "emergency essential" to take the anthrax vaccine (App. 74-75).

vaccine, is essentially admitting that the March 1999 Memorandum did *not* apply to these two new groups including CIVMARs.

Second, most importantly, the August 2002 DoD Memorandum permits the Court to address future policy concerns regarding federal civilian employees being ordered *without* consent to take the anthrax vaccine, or any other potentially debilitating vaccine. Under the March 1999 DoD Memorandum, only civilian employees designated as "emergency essential" were required to take the anthrax vaccine. As previously discussed, under DoD Directive 1404.10, a civilian employee before being designated as "emergency essential" may ***refuse*** the designation and ***shall*** be reassigned expeditiously, without loss of grade or pay, to a "non-emergency essential" position.

Now, under the August 2002 DoD Memorandum, a CIVMAR has no option but to take the anthrax vaccine or risk being terminated. In the present case, Mazares had been employed for eleven years before being requested to take the anthrax vaccine. The taking of the anthrax vaccine was *not* a condition of his employment when he was hired. The Court has never addressed the issue of whether the Navy may lawfully order CIVMARs to take the anthrax vaccine without the option of being reassigned.

Similarly, in the future, several other federal civilian employees will be required, without the option of being reassigned, to take a potentially debilitating vaccine that was *not* a condition of their employment before being hired. The Court has never specifically addressed the issue of whether the federal government may lawfully order civilian employees to take a potentially debilitating vaccine

that was not a condition of their employment before being hired. Unless the Court addresses this issue, these civilian employees will face the same fate as Mazares and Testman.

Finally, in the present case, the Navy in violation of the March 1999 DoD Memorandum ordered Mazares and Testman to take the anthrax vaccine. The Court has never addressed the issue of whether a *subordinate* military department may defy a "specific" DoD policy. In the future, several Executive Cabinet Secretaries will issue orders regarding the vaccination of federal civilian employees. Subordinate department heads will be in charge of implementing these orders. Similar to the present case, issues will arise as to whether the subordinate department head has followed the vaccination policy set forth by the Executive Cabinet Secretary. Unless the Court addresses this issue, there will be uncertainty in the future when a department head issues an order to a federal civilian employee to take a vaccination that is not specifically required by the Executive Cabinet Secretary.

CONCLUSION

For all of the reasons stated herein, the court's first impression decision affirming the Navy's authority to vaccinate CIVMARs departs from the accepted and usual course of judicial proceedings and therefore calls for an exercise of this Court's supervisory power. Additionally, the August 2002 DoD policy on the anthrax vaccination raises future policy concerns that call for an exercise of

this Court's supervisory power. Accordingly, this petition for writ of certiorari should be granted.

Dated: March 12, 2003

Respectfully submitted,

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PERSONNEL AND READINESS

AUG 6 2002

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS CHAIRMAN OF THE JOINT CHIEFS OF STAFF UNDER SECRETARIES OF DEFENSE ASSISTANT SECRETARIES OF DEFENSE GENERAL COUNSEL, DEPARTMENT OF DEFENSE INSPECTOR GENERAL, DEPARTMENT OF DEFENSE DIRECTORS OF DEFENSE AGENCIES COMMANDANT OF THE US COAST GUARD

SUBJECT: Policy on Administrative Issues Related to the Anthrax Vaccine Immunization Program (AVIP)

REFERENCE: Secretary of Defense Memorandum, "Reintroduction of the Anthrax Vaccine Immunization Program," June 28, 2002.

This memorandum provides policy guidance on administrative issues involving anthrax vaccinations.

Applicability and Scope

The scope of the AVIP policy includes personnel assigned to or deployed for more than 15 consecutive days in higher threat areas. Commanders will submit requests for exceptions (for example, persons rotating into higher threat areas repeatedly for more than 15 cumulative days in a 12-month period) to the Combatant Commander with responsibility for the designated higher threat area. Based upon subsequent recommendation of the Combatant Commander, exceptions will be determined by the

ASD(HA), in consultation with the Chairman of the Joint Chiefs of Staff. Personnel who will rotate out of assignment or re-deploy from higher threat areas in 90 days or less from the date of this memorandum will not be required to start vaccination at this time.

In addition to military personnel, the following personnel categories are subject to this policy:

- DoD civilian personnel classified as emergency-essential under DoD Directive 1404.10, "Emergency-Essential (E-E) DoD U.S. Citizen Civilian Employees," April 10, 1999
- Contractor personnel carrying out mission essential services as described in DoDI 3020.37, "Continuation of Essential DoD Contractor Services During Crisis," November 6, 1990;
- Other personnel categorized as alert forces, as defined in the joint regulation on Immunizations and Chemoprophylaxis (Air Force Joint Instruction 48-110, Army Regulation 40-562, BUMEDINST 6230.15, CG COMDTINST M6230.4E).

The Secretaries of the Military Departments, Commandant of the Coast Guard, and Combatant Commanders may also identify and recommend other cohorts of personnel for vaccination against anthrax through the Executive Agent to the ASD(HA), if they deem their occupations may place them at higher risk for exposure to anthrax, and their performance is essential for certain mission critical capabilities.

Component Plans

Each Service and Defense Agency shall develop operational plans to administer the vaccinations to personnel initiating and resuming the series. In addition, the Services and affected Defense Agencies shall develop detailed educational plans to inform personnel about the vaccine and the overall program through multiple information outlets. The education plans shall include information about benefits, side effects, and other medical information to be provided before anthrax vaccination. For personnel for whom the dosing schedule was interrupted, the educational materials shall include information on the interruption and the deferred dosing schedule. The education plans shall include provider education and in-service training materials to describe lessons learned. The plans shall designate communications tools, including Internet websites, for disseminating lessons learned from early portions of the program. Resumption shall commence only after the Assistant Secretary of Defense for Force Management Policy, or his designee has approved the component plans.

The plans shall incorporate healthcare access guidance for all active, reserve, emergency-essential civilian and contractor personnel affected by this policy. Guidance shall include information on access to care for personnel: 1) located near or on a military installation, 2) in a remote location, or 3) in a travel duty or leave status.

Resumption Phasing

Threat and risk shall determine resumption priority. Service members and designated civilian personnel in the higher threat areas shall receive priority because they are at higher risk. Those individuals that have had their doses

deferred shall resume the series when directed by the USD (P&R). The phasing policy should proceed as quickly as practicable, consistent with logistical constraints and management process considerations.

Record-Keeping

Each Component is responsible for implementation of a comprehensive immunization tracking system that incorporates member data, unit data, and vaccine lot information. Each Service shall monitor documentation of immunization data. Each Service shall perform annual audits of the immunization tracking system, including both the Active and Reserve personnel. Such audits shall be subject to review by the DoD Inspector General.

Reserve Component Personnel

Reserve Component (RC) personnel shall be in a duty status when receiving a DoD-directed immunization. Unit commanders must ensure all personnel to be immunized are in a duty status and they receive notification of the immunization requirement. Services will emphasize this policy in all appropriate communications.

Reserve Component members who incur or aggravate any injury, illness, or disease while performing active duty for less than 30 days, or on inactive duty training are entitled to medical care appropriate for the treatment of the injury, illness or disease. An adverse reaction from a DoD-directed immunization is a line of duty condition. Therefore, when a member of the RC presents for treatment at a Military Treatment Facility (MTF), expressing a belief that the condition for which treatment is sought is related to receiving an immunization during a period of

duty, the member must be examined and provided necessary medical care.

When treatment has been rendered or the individual's emergent condition is stabilized, a Line of Duty and/or Notice of Eligibility will be determined as soon as possible. For injuries, illness or disease unrelated to duty, RC members should seek medical attention from their personal healthcare providers.

Administrative Exemptions

This section provides criteria for administrative exemptions for selected military and non-military personnel (U.S. service members, DoD emergency-essential (E-E) civilian employees, other designated civilian personnel and comparable contractor personnel). It does not apply to medical exemptions.

Administrative exemption is applicable to retiring and separating personnel (without Reserve Component (RC) obligations and who do not plan to immediately re-enlist) and civilian employees and contractor personnel leaving a position subject to the AVIP with 180 days or less of service or employment remaining. This administrative exemption does not apply to personnel whom the commander determines shall receive the vaccine because of overriding mission requirements.

The Service Secretaries shall designate exemption authority for Service members, E-E and other designated civilian employees and comparable contractor and other personnel. Directors of Defense agencies shall designate exemption authority for affected personnel within their organizations. Commanders shall exempt from the AVIP

those personnel separating within 180 days (as described further below) who meet all of the following conditions: (a) they are not currently assigned or deployed to a designated higher threat area; (b) they are not scheduled to perform duty in a designated higher threat area (including temporary duty); and, (c) the commander has not directed vaccination because of overriding mission requirements. Personnel who meet these criteria should immediately identify themselves to their supervisors and commanders.

With respect to calculation of the 180-day period, the following specifications apply. For retiring or separating military personnel the applicable period is 180 days prior to their approved date of retirement or separation. RC members must have approved retirement orders to be effective within 180 days, reassignment date to the Non-Participating IRR/NARS, or expirations of enlistment within 180 days prior to consideration for exemption from the series. Those personnel who are separating from active duty but continuing service with the Selected Reserve must continue the entire series regardless of the mobility status. For E-E and other designated civilian and comparable employees and contractor personnel subject to the AVIP because of performance of essential contractor services, the applicable period is 180 days prior to the effective date of retirement, resignation, separation or reassignment out of a position subject to the AVIP.

The policy is effective no later than 60 days from the date of this memorandum for Service members and civilian personnel who are not members of a bargaining unit. Civilian personnel affected by this policy who are members of bargaining units will be considered for exemption consistent with applicable personnel management procedures.

Granting administrative exemptions is a personnel function, usually controlled by an individual's unit. Use the following exemption codes for electronic tracking of administrative exemptions. These codes may also be available in Service automated immunization tracking systems.

Administrative Exemption Codes:

Code	Meaning	Explanation or Example	Duration
AD	Administrative, Deceased	Service member is deceased	Indefinite
AL	Administrative, Emergency Leave	Service Member is on emergency leave	Max 1 month
AM	Administrative, Missing	Missing in action, prisoner of war	Indefinite
AP	Administrative PCS	Permanent change of station	Max 3 months
AR	Administrative, Refusal	UCMJ Actions	Until resolution
AS	Administrative, Separation	Discharge, separation retirement	Indefinite
AT	Administrative, Temporary	AWOL, legal action Pending	Max 3 months

Management Responsibility

The Secretary of the Army shall continue to function as Executive agent, managing and administering the overall program and acting as focal point for the submission of information from the Services relating to vaccine-associated adverse events and projected vaccine program

requirements. In addition, the Executive Agent shall monitor the Services' and affected Defense Agencies' implementation of the anthrax Vaccine Immunization Program and execute the Army's implementation plan.

The Secretaries of the Navy and the Air Force are responsible for AVIP execution within their respective Military Departments. The Directors of each Defense Agency are responsible for the execution of the AVIP within each of their respective agencies.

The senior military official from each of the Services previously assigned to direct and implement their respective anthrax vaccine implementation plan shall continue in this role. As such, they will implement, monitor, evaluate and document the AVIP in their respective departments, conform to standards established on medical protocols and informational materials, advise the Executive Agent of any special, operationally necessary implementation requirements of their respective Services, and establish procedures for coordinating and reporting required information to the Executive Agent. Defense Agency AVIP officials responsible for their AVIP execution shall conform to the same standards.

/s/ David S. C. Chu
David S. C. Chu

cc:
Chief of Staff of the Army
Chief of Naval Operations
Commandant of the Marine Corps
Chief of Staff of the Air Force
Surgeon General of the Army

Surgeon General of the Navy
Surgeon General of the Air Force